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In the Supreme Court of the United States

October Term, 1950.

No._____.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Eighth Circuit, entered February 26, 1951, affirming the judgment of the United States District Court for the Western District of Missouri, adjudging that the complaint (R. 2-33, Exhibits 33-71) did not state a cause of action under the Civil Rights Acts, and that the District Court did not need to comply with the requirements of Rule 12 (b) (6) of the Federal Rules of Civil Procedure and other provisions of said rules.*

*References to the printed record will be thus: (R. 2-33), e. g., pages 2 to 33 of the printed record. And (Pro. 1-22), e. g., pages 1 to 22 of the "Proceedings in United States Court of Appeals."

Opinions Below.

The opinion of the Court of Appeals is reported in 187 F. (2d) 242. See also Proceedings in United States Court of Appeals (Pro. 1-13).

The opinions of the District Court are in 75 F. Supp. 303 and 87 F. Supp. 438. Also in Vol. III (R. 769-784).

Jurisdiction.

The judgment of the Court of Appeals was entered on February 26, 1951. On March 16, 1951, a petition for rehearing, filed March 13, 1951, was denied (Pro. 15-20). The jurisdiction of this Court is invoked under Sec. 2, Art. III, U. S. Constitution, and Sections 1254 (1), 2101 (c) and 2106, Title 28, United States Code.

The issues as to which petitioner seeks this Court's review involve the construction of the Civil Rights Act of April 9, 1866, embodied in Sections 41 and 42, and also of Sections 43, 47 (2) (3), 48 and 49a, Title 8, U. S. C. Also the failure of the Court of Appeals to give full faith and credit and *res judicata* effect to the decision of the Supreme Court of Missouri in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751 (R. 37-50, 692-701), which decision with the admitted facts, establish that the Judgment entries and orders of the District Court of Harper County, Kansas, entered as a sequel to the void order of the Missouri "special" judge appointing Commerce Trust Company to administer estates with conflicting interests, were void, and that the loss resulting from the misappropriation of petitioner's property to satisfy said void judgment entries and orders conclusively establishes petitioner's right to recover under said Civil Rights Acts. The complaint (R. 2-33) with Exhibits (R. 33-71) does state a valid claim for relief within the jurisdiction

of the federal courts under the Civil Rights Acts. This issue, on the ground that the complaint "does not state a cause of action" (R. 83), was decided adversely to petitioner in the United States Court of Appeals (Pro. 1-13, 14).

Statutes, Constitutional and Treaty Provisions Provided.

The pertinent parts of the statutes and constitutional provisions and treaty involved are set out in Appendix, pages 29-33.

STATEMENT.

The Court of Appeals affirmed a judgment of the District Court dismissing the complaint on the ground that "it does not state a cause of action" (R. 83). Said complaint (R. 2-33, Exhibits 33-71) states the facts in this case so clearly that reference is made thereto, and same is made a part hereof without reproducing any part thereof here.

Said complaint discloses that respondents, and a Missouri "special" probate judge (R. 3-4), and a Kansas state district judge, were parties to a conspiracy to deprive petitioner and her testator of the rights secured to them by the Civil Rights Act of April 9, 1866 (14 Stat. at L. 27, Chap. 31, Section 1), enacted before the XIVth Amendment, and as a Missouri citizen in Kansas and Oklahoma, by Article IV, Section 2, clause 1, and by Section 1 of the XIVth Amendment of the United States Constitution.

In accomplishing said purpose respondents requested said "special" probate judge to remove Thomas S. Moffett as executor of the John Moffett estate on the ground that the interests of said estate and partnership estates which he was administering were in conflict, which request was sustained on said ground and on the ground that the same person was not qualified to administer estates with conflicting interests. Thereupon, on the application of Commerce Trust Company, the same special probate judge—although he had found that the same person was disqualified to administer said estates because of their conflicting interests—yet appointed Commerce Trust Company to act in the same identical conflicting capacities, and did so for the purpose alleged in paragraph 2 of the complaint (R. 4). Thereupon Commerce Trust Company, notwithstanding there were sufficient assets in Missouri to satisfy

a groundless claim made by it (R. 24) and knowing that petitioner's testator had retained a local counsel who was unpopular with the state district judge (R. 161-162), whose court was 310 miles from Kansas City, Missouri, was permitted by said state district judge, in direct violation of the laws of the State of Kansas, to intervene in said conflicting capacities (R. 19) and to prosecute said unfounded claim as executor of the John Moffett estate against itself as Missouri administrator of Moffett Brothers partnership estate and on March 5, 1932, to make a void judgment entry for $143,829.96 against itself in said capacity in favor of said John Moffett estate.

The Missouri Supreme Court holds that the act of the "special" probate judge in so appointing Commerce Trust Company to administer said conflicting estates was a nullity (*State to use Miller's Adm'r* v. *Bidlingmaier,* 26 Mo. 483; *State to use Mueller's Adm'r* v. *Reinhardt,* 31 Mo. 95, affirming 26 Mo. 483). The Kansas courts were governed by the rule that the same person cannot represent conflicting interests and that any resulting judgment is void in that state (*Peyton* v. *Chase County National Bank,* 124 Kan. 763; *State ex rel.* v. *Bradbury,* 123 Kan. 495; *Yager* v. *Liberty Royalties Corp.,* 123 F. 2d 44, 47).

Commerce Trust Company, through emissaries, had a secret conference with said state district judge, not discovered by petitioner until some 16 months thereafter (R. 183), by virtue of which a void entry of a judgment for $101,228.06 (R. 21, 102-103) was made against the Oklahoma administrators of the assets of a partnership estate in Oklahoma—which administrators were not before the Kansas district court in that capacity. Said Kansas state judge, sitting in Kansas, without jurisdiction so to do, entered a decree of partition (R. 31, 71, 370-396) on the records of his court of some 17,000 acres of Oklahoma lands. Pursuant to a void order of the Missouri probate

court (R. 529) with reference to lands in Oklahoma, said Commerce Trust Company received a deed (R. 526-538) to said lands from the surviving administrator. And pursuant to a void order of said probate court, and another of said Kansas state district court, Commerce Trust Company made a deed conveying Oklahoma lands to the John Moffett estate in part satisfaction of the void judgment entered against it as Missouri administrator of Moffett Brothers partnership estate (R. 530).

Said Commerce Trust Company was not in possession of, nor had it title to any of the assets of said Moffett Brothers partnership estate in Kansas (R. 20, 19). So that, no judgment *in rem* could have been rendered against it in Kansas, but it was of the variety mentioned in *Stacey* v. *Thrasher*, 6 How. 44, to-wit: *in personam* and void, as held by the Supreme Court of Kansas in *National Bank of Topeka* v. *Mitchell*, 154 Kansas 276.

Some 14 groundless actions (R. 9-14), pursuant to said conspiracy, were instituted against petitioner and her interest by the conspirators, particularly by Commerce Trust Company, seeking an aggregate of about $5,000,000.00 (R. 9), many of which groundless actions are still pending, and the institution and maintenance of which on the dockets of the courts so affected petitioner's and the Moffett credit (R. 28) that, in addition to the 8,080 acres of Moffett Brothers Kansas lands (R. 22) and the 17,000 acres of Oklahoma lands (R. 31), where petitioner owned the majority interest, some 30,000 additional acres of Kansas lands were lost (R. 14). The Kansas and Oklahoma lands were sacrificed for a moiety of their value, pursuant to the conspiracy, in carrying out which, amongst other instances is one to the effect that said district judge authorized the sacrifice of all said Kansas lands for $99,700.00 by credits for said sum on said void judgment against Commerce Trust Company as Missouri adminis-

trator of Moffett Brothers partnership estate, and within a year thereafter—although there was no change in values—and although appraisers appointed by said district judge had valued said lands at $181,873.93—which were inventoried in the probate court as worth $255,040.00 and which were reasonably worth the sum of $318,800.00 (R. 170)—yet said district judge knowingly approved the unlawful misappropriation of said property for said moiety of its value.

After said misappropriation of said Oklahoma and Kansas Moffett Brothers lands through the district court of Harper County, Kansas, B. C. Howard and Commerce Trust Company instituted a proceeding in the probate court at Kansas City (R. 25), seeking authority from said probate court on the part of Commerce Trust Company to pay from Moffett Brothers partnership assets to Mr. Howard payment from said assets for his services in despoiling said estate as its attorney by causing same to be turned over to the estate of John Moffett, of which Commerce Trust Company was executor, in part satisfaction of said void judgment against Commerce Trust Company.

Mrs. Weede became a party to said proceedings, represented by Orlin A. Weede, who also ostensibly represented Mr. Howard in said proceedings, wherein respondents offered in evidence the said judgment entries and court orders by the District Court of Harper County, Kansas, and asserted that said entries and orders were entitled to full faith and credit and were *res judicata* of the issues then before the court (R. 660-661), which contentions were sustained by the probate court, and on appeal to the Missouri circuit court said contentions were likewise sustained. But, on appeal to the Supreme Court of Missouri from the judgment of said circuit court, said court found that Commerce Trust Company represented conflicting

interests (R. 48, 49-50), and that Mr. Howard represented said Commerce Trust Company in said conflicting capacities, and thereupon it entered a judgment and filed an opinion (R. 37-50, 692-701), reversing the judgment of the circuit court, with directions, and denying any faith or credit or *res judicata* effect to said judgments and orders in the Kansas courts. Said judgment and proceedings in the Supreme Court of Missouri, being later than the Kansas entries, are pleaded as *res judicata* in the dismissed complaint (R. 25), as facts judicially found rendering the Kansas entries void under the laws of Kansas, Missouri and the United States.

The opinion of the Court of Appeals contains the following statement (Pro. 11):

> "Plaintiff's allegations that the decisions of the various state courts in litigation in which she was involved were void or arbitrarily or willfully made merely expresses an opinion not uncommon among defeated litigants, and, as appears from the face of the complaint, not entertained by the State Supreme Courts which reviewed the judgments."

The allegations in the complaint (Par. 45, R. 25) with reference to the proceedings in the Supreme Court of Missouri as reflected in Exhibit "E" (R. 37-50) made part of said complaint, show that the Court of Appeals entirely overlooked the allegations of said complaint as to said point. Said decision of the Supreme Court of Missouri, being the last, was permitted by the Court of Appeals to be collaterally attacked by respondents in the Court of Appeals, notwithstanding the laws of both Missouri, Kansas and the Federal courts, including this, hold that the last judgment cannot be collaterally attacked by showing the first (Freeman on Judgments, 5th Ed., Vol. 2,

Sec. 629; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, l. c. 78; *Donald* v. *White Lumber Co.*, 180 F. (2d) 435).

The contentions of respondents in said cause in the Supreme Court of Missouri as to said Kansas judgments are reflected in the briefs of Commerce Trust Company and Messrs. Weede and Howard at pages 743 to 745 of 345 Mo. (R. 39-41). The contentions of petitioner in that case are reflected in the reporter's report shown on pages 742 and 743 of said 345 Mo. (R. 38-39) and are made part of the complaint by being included in Exhibit "E," made part of said complaint (R. 25).

As appears from said Exhibit "E" (R. 37-50) and also from pages 750 and 751 of 345 Mo., the Supreme Court of Missouri found as follows:

> "There can be no question on the conflicting interests of the John Moffett estate and the Moffett Brothers estate in the partition-accounting suit, and the rule that counsel cannot lawfully represent conflicting interests in the courts of the land is as old as our system of jurisprudence." (P. 750, R. 48.)
>
> "As we have stated before, there can be no question as to the conflict of interest, in the partition-accounting suit, between the John Moffett estate and the Moffett Brothers estate, and the rule, as we have seen, is that an attorney cannot receive pay from both sides where the respective interests are conflicting." (P. 751, R. 49-50.)
>
> "And notwithstanding that *the principal contention* in the partition-accounting suit was on the claim of the John Moffett estate against the Moffett Brothers estate, claimant admits that he represented both estates in that suit. And it appears that claimant, at the trial of the partition-accounting suit, presented the evidence that resulted in a judgment, against one of his clients, for $143,829.96. The picture can be better appreciated by visioning John and Thomas S. Moffett as living and adversaries in a law-

suit on the same claim of indebtedness, as here, and claimant representing both of them." (P. 750, R. 48.)

That the said conflict so found by the Supreme Court rendered the said Kansas judgments void was pleaded as *res judicata* in the complaint (R. 25). The Court of Appeals, having failed to give full faith and credit to said Missouri Supreme Court judgment, rendered a decision in conflict with the decision of this Court in *Cooper* v. *Newell*, 173 U. S. 555, l. c. 566-567.

Said judgment of the Supreme Court of Missouri was properly pleaded as a part of petitioner's claim or cause of action (*New Orleans* v. *Citizens Bank*, 167 U. S. 371; *Baldwin* v. *Maryland*, 179 U. S. 220; *Turnverein* v. *Hagerman*, 232 Mo. 693). And so, as to this case, in the District Court and Court of Appeals, said judgment of the Supreme Court was conclusive as to said facts so found on the issue as to whether or not the Kansas judgments, by means of which petitioner and testator lost their properties, were void under the law declared in *Goedecke* v. *Gralnick*, 354 Mo. 478, l. c. 487-488, which declares the law in exactly the same way as this Court declared it in *Commissioner* v. *Sunnen*, 333 U. S. 591, l. c. 597-598, as to "matters in issue or points controverted, upon the determination of which the finding or verdict was rendered" in a second action "where the second action between the same parties is upon a different cause of demand," reversing the author of the opinion of the Court of Appeals herein conclusively adjudicating that Commerce Trust Company and its attorney, B. C. Howard, represented conflicting interests, thereby depriving petitioner of her property without due process of law and denying her the equal protection of the laws in relation of the XIVth Amendment to the United States Constitution.

The District Court, in this case at the request of respondents, permitted them to file matter and material outside the pleadings, in accordance with the provisions of Rule 12 (b) (6), between April, 1948, and December 1, 1949 (R. 83), which are reflected in the 787 pages of record filed by petitioner, and in the 1,992 pages of supplemental records filed by respondents. The Court of Appeals ignored the foregoing facts in its opinion, except insofar as its opinion contradicted the record, as instance, when it stated in said opinion that the Supreme Courts of the states—including, of course, Missouri—did not hold that the decisions of the various state courts in Kansas were void and arbitrarily and willfully made, whereas the said decision of the Supreme Court of Missouri is directly contrary to said statement in said opinion of the Court of Appeals, and by its finding conclusively establishes that all the prior judgments and orders of the District Court of Harper County, Kansas, were void and arbitrarily and unlawfully made.

The Court of Appeals also stated in its opinion that, "assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, • • • they were not void but, at most, erroneous," thereby rendering a decision in conflict with all the other circuits and this Court, and the courts of Missouri, Kansas, Oklahoma and England, well stated in *Manning* v. *Ketchem,* 58 F. (2d) 948 (C. C. A. 6). Thus, l. c. 949:

> "(2, 3) When a judge acts in the clear absence of all jurisdiction, *i. e.,* of authority to act officially over the subject matter in hand, the proceeding is *coram non judice.* In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the Case of the Marshalsea,

> 10 Coke 68. It was recognized as such in *Bradley* v. *Fisher,* 13 Wall. (80 U. S.) 335, 351, 20 L. Ed. 646. In *State ex rel. Egan* v. *Wolever,* 127 Ind. 306, 26 N. E. 762, 763, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.' "

Manning v. *Ketcham* says "• • • the highest court of the state announced that appellant was acting without his jurisdiction." Herein, the highest courts in Missouri (345 Mo. 741) and Kansas (154 Kan. 276) say the same as to said Kansas state judge. The Missouri ruling here, like the Kentucky ruling there, is *res judicata.*

The judgment entry of the Kansas state court against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate, and against the administrators of the Oklahoma partnership estate, were void irrespective of the conflict of interest question, because said administrators had no property of said estates in their possession or under their control in the state of Kansas under the law as declared by this Court in *Rose* v. *Himely,* 4 Cranch. 241, 277; in *Brown* v. *Fletcher's Estate,* 210 U. S. 82, and other cases; and the Supreme Court of Kansas in *National Bank of Topeka* v. *Mitchell,* 154 Kan. 276, 118 Pac. (2d) 519, citing said cases, and the Federal case of *Burrowes* v. *Goodman,* 50 F. (2d) 92 (C. A. 2).

Notwithstanding an executor or administrator under the law of Missouri has always been recognized as an instrument or agency of the state, provided for by the laws of the state, to enable the state in the exercise of its sovereign power to transfer the properties of deceased persons to those to whom its laws direct such properties to be transferred, yet the opinion of the Court of Appeals holds

(Pro. 11) that the Commerce Trust Company was not a state agent nor a repository of state power. And it expressly declared that the complaint failed "to show that plaintiff has suffered or will suffer the deprivation of a federal right" (Pro. 12).

Petitioner seeks certiorari because the rulings of the Court of Appeals are in conflict with the rulings and decisions of all the other courts mentioned in paragraph 5 of Rule 38 of this Court by reason of which the application of the doctrine of "sound judicial discretion" makes the granting of the writ in this case a matter of right and not merely of grace.

Petitioner invokes the appellate jurisdiction conferred on this Court by Sections 1 and 2 of Article III of the Constitution, and states no exception has been made by Congress to the exercise of said appellate jurisdiction. Congress could not delegate legislative power to this Court to divest itself of that jurisdiction which is vested in it by the Constitution.

The District Court, without ruling on petitioner's motions for leave to amend the complaint and to file a supplemental complaint as to matters occuring since the institution of the action, refused to pass on the motion for summary judgment, as required by Rule 12 (b) (6), notwithstanding petitioner was put to great expense in filing matter and material in opposition to respondents.

Many other allegations in said complaint deal with questions which are not reproduced in this statement because they are briefly and accurately stated in the complaint made part hereof, and some thereof are elsewhere referred to herein, and in the supporting brief.

QUESTIONS PRESENTED.

I.

The main issue presented is whether the Court of Appeals erred in holding that Sections 41 and 42 (from Civil Rights Act of April 9, 1866) and 43, 47 and 48, Title 8, U. S. C., were not intended to establish, and did not establish, a civil cause of action against a state agent (an executor and administrator) and fellow conspirators who, knowingly and purposefully, misused state power, pursuant to a conspiracy with two state judges and said state agent, by means of void court orders and judgments, knowingly and purposefully made, to deprive a citizen of one state and of the United States, through the courts of said state and adjoining states, of the right to acquire and enjoy property devised and bequeathed to petitioner.

II.

Rule 12 (b) (6) of the Rules of Civil Procedure, promulgated by this Court for the guidance of federal district courts, require a federal district court, which permitted the filing of matter and material outside the pleadings, and did not exclude same, to dispose of the case under Rule 56 relating to a summary judgment—where the proof filed by the parties for nearly two years demonstrated that respondents were not entitled to the summary judgment they asked, though petitioner was.

III.

This Court cannot lawfully refuse appellate jurisdiction vested in it by the Constitution and laws of the United States to enable it to perform its indispensable

duty to take jurisdiction as to this case by granting the writ prayed for.

The questions raised in the assignments of error (pages 16-18) are also questions presented by this petition.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that the amended complaint "does not state a cause of action" (R. 83).

(2) In holding (Pro. 13) "Rule 12 (b) is not applicable," and that the District Court was not required by Rule 12 (b) (6) of the Rules of Civil Procedure for the District Courts, converting the motions to dismiss into motions for summary judgment at respondents' request, to decide that respondents were not entitled to a summary judgment.

(3) In holding that (Pro. 11)

> "* * * assuming that the state court proceedings were not within the jurisdiction of the courts which decided them * * * they were not void but, at most, erroneous."

(4) In holding that (Pro. 12)

> "Here the complaint fails to show that plaintiff has suffered or will suffer the deprivation of a federal right."

(5) In holding that it read (Pro. 8) "* * * the complaint in the light most favorable to the plaintiff" whereas it overlooked almost all of the essential allegations of the complaint.

(6) In holding that the members of the conspiracy, in their misuse of state power, did not act under color of the state law when they committed the overt acts pursuant to the conspiracy, depriving petitioner of her property rights.

(7) In holding that because petitioner and Thomas S. Moffett were represented by counsel, said fact obliterated the overt acts of the state agents and officials (R. 23, 551) in discriminating against Thomas S. Moffett and plaintiff and denying to them, intentionally and purposefully, the equal protection of the laws, and depriving them of their property without due process of law.

(8) In holding that the Civil Rights Statute of April 9, 1866, as reproduced in Section 42, Title 8, U. S. C., did not protect, secure or give any property right to petitioner as a citizen of the United States.

(9) In holding that Section 1 of the XIVth Amendment to the Constitution did not secure or guarantee any property rights to petitioner.

(10) In holding that Sections 47 and 48, Title 8, U. S. C., did not authorize petitioner to recover against respondents.

(11) In holding that Section 43, Title 8, U. S. C., did not entitle petitioner to a judgment against respondents.

(12) In holding that Clause 1, Section 2, Article IV, of the Constitution did not protect petitioner, as a citizen of Missouri while in Kansas courts, and give to her the same privileges and immunities as the citizens of Kansas enjoyed under the laws of Kansas.

(13) In holding that citizens of the United States and of Missouri, and persons within the jurisdiction of the states of Missouri, Kansas and Oklahoma, were not entitled to the protection of the aforesaid provisions of the United States Constitution and laws.

(14) In holding (Pro. 11)

> "We dismiss as unworthy of consideration the allegation that the administrators and executors act-

ing under court appointments in the various states in which the property of the estates was located were agents of sovereign powers of the states, and as plaintiffs or defendants in the state court actions were acting under color of law within the meaning of anything in the Civil Rights Acts or the 14th Amendment."

(15) In incorrectly stating in its opinion many facts shown by the record.

(16) In holding that the District Court did not err in failing to rule on each and all of the pending motions filed by petitioner, and in failing to sustain each and all of them.

(17) In failing to grant an injunction to stay proceedings in cause No. 339,134 in the Missouri state court and thereby preserve federal jurisdiction to grant the relief sought from the loss occasioned by the institution and pendency on the docket of said groundless action in the state court for over 20 years.

(18) In failing to hold that the due process provision of the Fifth Amendment to the United States Constitution rendered the Missouri Partnership Statutes, Sections 87 and 88, R. S., 1939, enacted in 1845, made applicable by Article III of the treaty with France, void.

(19) In holding valid the three void deeds made by Commerce Trust Company as a Missouri administrator purporting to convey lands of said Moffett estates in states other than Missouri, all of which were made by authority of void court orders.

(20) In holding that Commerce Trust Company was executor or administrator of Moffett estates because its claimed capacity of the office of executor and adminis-

trator is a direct result of its act in writing the will of John Moffett in consideration of its nomination as alternative executor, which act was a misdemeanor under the statute of Missouri enacted in 1915 (Laws, Missouri, 1915, p. 99).

(21) In failing to state in its opinion the principal facts alleged in the complaint essential to a recovery, and in deciding the case upon the partial statement of facts in said opinion.

(22) In failing to hold that the due process provision of the XIVth Amendment to the Constitution rendered Sections 87 and 88, R. S. Mo., 1939, void.

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court of Appeals erroneously affirmed the decision of the District Court holding that the complaint "does not state a cause of action" (83), whereas it states that this action arises under the Civil Rights Act of April 9, 1866, now Sections 41 and 42, Title 8, U. S. C.; and under Sections 43, 47 and 48, Title 8, U. S. C., Act IV, Sec. 2, Clause 1, and the XIVth Amendment to the United States Constitution; that petitioner and her testator were denied the equal protection of the laws by a Missouri "special" probate judge and a Kansas state district judge by void orders and judgment entries depriving them of their property under color of state law, pursuant to a conspiracy to which said state officials and respondents were parties (R. 5-6).

Said decision conflicts with decisions of other courts of appeal on the same matter and decides important questions of local law in conflict with applicable decisions

of the Supreme Courts of Missouri, Kansas and Oklahoma, and decides important unsettled questions of federal law which should be settled by this Court, and decides federal questions in conflict with applicable decisions of this Court. The opinion of said court of appeals, in failing to state the essential facts in said complaint on which petitioner based her rights to recover—and in sanctioning the like departure by the District Court—has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision under its Rule 38, as more fully appears from petitioner's supporting brief filed herewith. Petitioner's testator was administering the partnership estates of Moffett Brothers and Moffet Brothers and Andrews, and as executor of the estate of John Moffett. On a verified petition of respondents said "special" probate judge had revoked his letters testamentary on the ground that the same person was not qualified to administer said estates because their interests were conflicting (R. 400-412).

And notwithstanding the actual knowledge resulting from said finding by the "special" probate judge, he thereafter, on application by it, entered orders purporting to appoint Commerce Trust Company to administer said estates in the same identical conflicting capacities as thus occasioned the removal of petitioner's testator.

Said act was done pursuant to the conspiracy so as to enable Commerce Trust Company (R. 4) to perpetrate acts which it later perpetrated, to-wit: prosecuted as executor of John Moffett's estate groundless claims against itself as Missouri administrator of Moffett Brothers partnership estate, on which groundless claims said district judge approved a judgment entry, prepared by respondents, on March 5, 1932, for $143,829.96 (R. 20). Said judgment entry included an entry in favor of Com-

merce Trust Company for $101,228.06 against the Oklahoma administrators of an estate in Oklahoma who were not parties as such and none of the properties of which estate were in Kansas, as a result of a secret conference (R. 183-184, 569, 594) had with said district judge by Messrs. Howard and Weede as emissaries of Commerce Trust Company (R. 102, 184) and pursuant to a ruling made at Kingman, Kansas, 40 miles away from the District Court of Harper County, on February 22, 1932 (R. 182-183), and without notice or knowledge thereof (R. 183) by petitioner until 16 months thereafter. Said Commerce Trust Company had no title to any assets of said partnership estates in Kansas (R. 19, 21) nor was it an administrator in said state. Said Oklahoma administrators were not before the Kansas court in said capacity (R. 21), and none of the assets of the estate which they were administering in Oklahoma were in Kansas. So that the court was without jurisdiction to make or approve such judgment entries.

II.

The fact that the same counsel was on both sides of the same cases in which judgments and orders were made, and that he had secret conferences with the Kansas state district judge, in and of itself prevented a fair trial of any issue in the case. So that petitioner was deprived of her property in violation of the due process of law provision of the XIVth Amendment. As to the legal result, see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514, l. c. 541; and *Skelly Oil Co.* v. *Universal Oil Products*, 86 N. E. (2d) 875. Beginning with *Cholmondeley* v. *Clinton*, 19 Ves. 261, s. c. Cooper 80, the Supreme Court of California in *In re Cowdray*, 69 Cal. 32, has investigated the authorities, both here and in England, condemning such misconduct of counsel, and *In re Whittemore*,

69 Cal. 67, held that the opposing counsel who retained him to violate his duty was subject to like condemnation for his acts, which also operated to deprive petitioner and her testator of their properties without due process of law, contrary to the prohibition of the XIVth Amendment to the Constitution.

III.

The decision of the Court of Appeals stated in its opinion as follows (Pro. 11)

> " • • • assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, • • • they were not void but, at most, erroneous"

is in conflict with the decisions, on the same subject, of this Court, and of all Circuit Courts and all the States, of England, and of all courts in the Anglo-Saxon jurisdictions.

IV.

Because said Missouri "special" probate judge and said state district judge of Harper County, Kansas, were parties to the conspiracy to use state power to deprive petitioner and her testator of their properties by the unlawful means set forth in the complaint, and respondents were parties to the conspiracy, the complaint stated a cause of action whether the judgments were or were not void, under the principle stated in *Shelley* v. *Kraemer*, 334 U. S., l. c. 17-18.

V.

Petitioner is entitled to recover under the allegations of the complaint, even without reference to the provisions of the XIVth Amendment, since included in said allegations are those which authorize recovery against respond-

ents for violation of petitioner's rights under Clause 1, Section 2, Article IV, of the Constitution under the authorities referred to in *Valle* v. *Stengel,* 176 F. (2d) 692, in paragraphs 7, 8, 9 and 10. And is authorized to recover under said Civil Rights Act of April 9, 1866, now Sections 41 and 42, Title 8, U. S. C., in accordance with the decision of this Court in *Hurd* v. *Hodge,* 334 U. S. 24, construing said Section 42, Title 8, U. S. C. So that, whether Commerce Trust Company was or was not a repository of state power would not prevent the recovery against it in this case.

VI.

Commerce Trust Company, in assuming to act as executor and administrator, was acting under color of state law and therefore, as a repository of state power assumed by it, was an agent of the State of Missouri, and for its wrongful acts in depriving petitioner and testator of their properties is liable to petitioner under the Civil Rights Acts, for the reason that, throughout the ages, it is a sovereign function of a state to provide how properties of deceased persons shall be transferred to those who are entitled to same under the laws of the state, and to provide instruments and agents, such as executors and administrators, in the exercise of such sovereign power to enable the state to distribute properties of such deceased persons to those entitled thereto under the laws of the state.

VII.

Though some conspirators were not state agents, yet, since they were aided and abetted by state judges and conspired with and aided and abetted state agents to accomplish the result occasioned by the unlawful overt acts alleged, all such persons are liable under Section 43,

Title 8, U. S. C., for misusing state power to deprive petitioner of her property, in accordance with the principle applied by this Court in *Williams* v. *United States,* No. 365, October Term 1950, affirming the fifth circuit in 179 F. (2d) 656, wherein it was held that a person not in the employ of a state or city, but who had a courtesy card from a city, and who cooperated with an officer of the city, was held liable under Section 20 of the criminal code, same being *in pari materia* with Section 43, Title 8, U. S. C. See *Picking* v. *Pennsylvania R. Co.,* 151 F. (2d) 240.

VIII.

The institution of 14 groundless actions and claims (R. 9-14) against petitioner's interest more than 20 years ago for approximately $5,000,000.00, most of which remain on the dockets of the courts in which they were instituted, have destroyed the Moffett credit and thereby caused damage to petitioner, renders respondents liable under the common law recognized in *State* v. *Bacon,* 27 R. I. 252, 61 Atl. 653; *Kilgore* v. *Dr. P. Phillips & Sons,* 12 So. (2d) 465, 152 Fla. 578; *Verplanck* v. *Van Buren,* 76 N. Y. 247; *White* v. *McCoy Land Co.,* 87 S. W. (2d) 672, 229 Mo. App. 1019; *White* v. *Scarritt,* 341 Mo. 1004; *White* v. *McCoy Land Co. and Scarritt,* 101 S. W. (2d) 763; *Sovereign Camp Woodmen of the World* v. *O'Neill,* 266 U. S., l. c. 297. Said acts rendered respondents liable under the Civil Rights Acts by reason of said obstruction of justice.

IX.

The "sound judicial discretion" specified in Rule 38 of this Court, and which this Court holds governs it in the granting of writs of certiorari, entitles petitioner, under the applicable law and the facts in this case, to said writ of certiorari as a matter of right, and not of discretion or

grace, in accordance with Chief Justice Marshall's definition of judicial discretion in *Osborn et al.* v. *Bank of United States,* 9 Wheat. 738, where he said, l. c. 866:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law."

X.

Since judicial power of the United States, and especially the appellate jurisdiction of this Court, is vested in it by the Constitution and not by act of Congress, and since the only power vested in Congress by Clause 18, Section 8, Article I, is to enact laws to enable this Court to exercise the jurisdiction so vested in it by the Constitution, then Congress did not have power to delegate its legislative power to this Court, nor could Congress authorize this Court to exercise its discretion as to whether or not it would take jurisdiction of this case, since the Constitution itself vested appellate jurisdiction in this Court, and at the same time entitled petitioner to invoke it (*Durousseau* v. *United States,* 6 Cranch. 307, l. c. 313-314).

XI.

Commerce Trust Company, as a representative of the state, offered in evidence its untrue Exhibit No. 8 (R. 23) in support of a claim in favor of the John Moffett estate, which is shown by his own signatures in writing (R. 417, 419) never to have had any basis in fact, and depriving petitioner of her majority interest in said Moffett Brothers Kansas and Oklahoma properties, in violation of the due process provision of the XIVth Amendment, and of Clause 1, Section 2, Article IV, of the Constitution, and of the Civil Rights Act of April 9, 1866, under the law declared in ***Mooney*** **v.** ***Holahan,*** 294 U. S. 103.

XII.

Since the question as to whether or not the judgments of the District Court of Harper County, Kansas, were void has been settled against respondents by the decision of the Supreme Court of Missouri in 345 Mo. 741-751; and since said decision was pleaded as *res judicata* (R. 25) and the record in connection with it filed in the District Court (R. 37-50, 692-701); and since said record discloses that the Supreme Court of Missouri found that Commerce Trust Company and its attorney, Mr. Howard, represented conflicting interests so that the resulting judgment entries were void, both under the laws of Kansas, Missouri and the United States, then it is conclusively established that petitioner is entitled to recover under the Civil Rights Act against respondents as a matter of law. The failure of the Court of Appeals to give effect to the pleaded (R. 25) and proven (R. 692-701) judgment of the Supreme Court of Missouri renders its decision herein in direct conflict with the opinion of this

Court on this identical question in *Cooper* v. *Newell*, 173 U. S. 555, l. c. 566-567.

Therefore, since the Federal Rules of Civil Procedure in Rule 1 requires that the proceedings of the District Court shall be brought to a conclusion as speedily and inexpensively as possible; and since Rule 12 (b) (6) contained a command to the District Court to dispose of the case as on a motion for summary judgment under Rule 56; and since said District Court failed to comply with said rules and the Court of Appeals has approved that action; and since respondents have kept this vexatious and groundless litigation on the dockets and these estates unadministered for nearly 24 years, it is respectfully submitted that this Court, in this instance, apply the same principle applied to the Supreme Court of Missouri in *Magwire* v. *Tyler*, 17 Wall. 253-294, when it found that the Supreme Court of said State did not apply the federal law to the rights of the litigants, this Court itself ended the litigation by itself rendering a decision disposing of the entire controversy.

Petitioner respectfully invokes the application of that sound principle to end this litigation as it applied it to end that case.

WHEREFORE, your petitioner prays that a writ of certiorari under the seal of this Court directed to the United States Court of Appeals for the Eighth Judicial Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Eighth Circuit and of the case numbered and entitled on its docket No. 14,115 Civil, Louise McGrew Moffett as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, Appellant, v. Commerce Trust Company, a Corporation, Helen Weede, Orlin A.

Weede, B. C. Howard, William H. Kopp and R. E. Copman, Appellees, to the end that said cause may be reviewed and determined by this Court as provided for by the Constitution and laws of the United States, and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated May 24, 1951, at Kansas City, Missouri.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

By MARTIN J. O'DONNELL,
Attorney for Petitioner.

APPENDIX.

Statutes Involved.

United States Code, Title 8.

"Section 41. Equal rights under the law
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S., Sec. 1977."

"Section 42. Property rights of citizens
All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R. S., Sec. 1978."

"Section 43. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S., Sec. 1979."

"Section 47. Conspiracy to interfere with civil rights
"Obstructing justice; * * *
"(2) * * *
"if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State

or Territory, with intent to deny to any citizen the equal protection of the laws, * * *

"Depriving persons of rights or privileges

"(3) If two or more persons in any State or Territory conspire * * * for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or

if one or more persons engaged in any such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R. S., Sec. 1980."

"Section 48. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 47 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; * * * R. S., Sec. 1981."

"Section 49a. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of chapter 3 of Title 8, for the protection of all persons in the United States in their civil rights, and for

their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. * * * R. S., Sec. 722."

Constitutional Provisions Involved.

Article IV, Section 2, Clause 1.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

(R. 6, 21, 308.)

Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Treaty With France
April 30, 1803.

(R. 4)

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and

admitted as soon as possible according to the principles of the federal constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; * * *"

Missouri Partnership Administration Statutes.

(Revised Statutes, 1939)

Section 87.

"Every surviving partner, on the demand of any administrator or executor of a deceased partner, shall exhibit to the appraisers the partnership property belonging to the firm at the time of the death of such deceased partner, for appraisement; and in case the administration thereof shall devolve on such administrator or executor, the said survivor shall surrender to him, on demand, all the property of such partnership, including their books and papers, and all necessary documents pertaining to the same, and shall afford him all reasonable information and facilities for the execution of his trust. R. S., 1929, Sec. 87; 1919, Sec. 86."

Section 88.

"Every surviving partner who shall neglect or refuse to comply with the provisions in the last two preceding sections may be cited for such neglect or refusal before the proper court; and unless he comply with such provisions, or show sufficient cause for his omission, the court may commit him to the common jail of the county, there to remain until he consent to comply, or is discharged by due course of law. R. S., 1929, Sec. 88; 1919, Sec. 87."

Kansas Statute of Wills.

R. S. Kan., 1923 and 1935.

Section 22-201.

"Any person of full age and sound mind and memory, having an interest in real or personal property of any description whatever, may give and devise the same to any person by last will and testament lawfully executed, subject nevertheless to the rights of creditors and to the provisions of this act."

Section 22-238.

"No man while married shall bequeath away from his wife more than one-half of his property, nor shall any woman while married bequeath away from her husband more than one-half of her property. But either may consent in writing, executed in the presence of two witnesses, that the other may bequeath more than one-half of his or her property from the one so consenting."

Section 22-239.

"Any married person having no children may devise one-half of his or her property to other persons than the husband or wife."

Section 22-241.

"A will shall be revoked by the testator tearing, canceling, obliterating or destroying the same with the intention of revoking it, by the testator himself, or by some person in his presence or by his direction, or by some other will or codicil in writing executed as prescribed by this act, or by some other writing signed, attested and subscribed in the manner provided by this act for the making of a will; but nothing herein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

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In the Supreme Court of the United States

No. .....

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

The complaint shows that this case arises under Article IV, Section 2, Clause 1, and Section 1 of the XIVth Amendment to the United States Constitution, and under Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C.; and that respondents were parties to a conspiracy, with others exercising state power, in pursuance of which they fraudulently made use of legal proceedings to deprive Thomas S. Moffett and petitioner of their properties in violation of said provisions of the Constitution and laws.

The Court of Appeals having held that the complaint failed to state a cause of action (Pro. 8) or claim on which relief could be granted, in the interest of brevity, without reproducing its allegations, said complaint (R. 2-33, with Exhibits "A" to "K," R. 33-72) is made a part of this statement.

Additional facts are stated in motions to amend (R. 237-240, 307-308) said complaint and a supplemental complaint (R. 278-290) with Exhibits "A," "B," "C" and "D" (R. 291-307), none of which were ruled on.

The conspirators aided and abetted each other (R. par. 31, p. 17) in the commission of the overt acts. On application of Commerce Trust Company (R. 18-19) a Missouri "special" probate judge appointed it as executor of one estate and administrator of two partnership estates, the interests of which were in conflict, for the purpose of enabling (R. 4) Commerce Trust Company in one capacity to prosecute groundless claims (R. 9-14) against itself in other capacities, and thereby to unlawfully deprive petitioner of the property devised and bequeathed to her. Said appointment was in December, 1928 (R. 4, 111) after said "special" probate judge revoked the letters testamentary of Thomas S. Moffett on the ground that the same person was not qualified to represent estates with conflicting interests (R. 4). Said order appointing the same person so to do was a nullity (*State to use Miller's Adm'r* v. *Bidlingmaier*, 26 Mo. 483; *State to use Mueller's Adm'r* v. *Reinhardt*, 31 Mo. 95, affirming 26 Mo., cited to this hour).

Though sufficient assets were in Missouri to satisfy the unfounded claim (R. 24), had it been valid, Commerce Trust Company, knowing that it could not get it enforced in Missouri, and knowing that Thomas S. Moffett had retained a local counsel who was unpopular with the state

district judge, proceeded to his court 310 miles from the domicile of all the parties and intervened in said conflicting capacities (R. 18-19) in the District Court of Harper County, Kansas, to prosecute said unfounded claim in favor of an estate of which it claimed to be executor, and against itself as claimed administrator of another estate in Missouri. The district judge of said county, over objection, permitted said intervention, and permitted Mr. Howard as its attorney, to prosecute said claim for Commerce Trust Company as executor against Commerce Trust Company as Missouri administrator (while he represented it in both conflicting capacities), though it had neither title to nor possession of any assets (R. 19, 20, 21, 69) of said estates, nor any appointment as administrator thereof in Kansas, as admitted by Commerce Trust Company (R. 69) when it stated:

> "This contention, which is the very core of plaintiff's case, is that the Kansas judgments were void because Commerce Trust Company, administering the partnership estate of Moffett Brothers, intervened in the Kansas litigation without having title to or possession of any assets of that partnership in the State of Kansas."

Said state district judge, over objection, permitted Commerce Trust Company, by and with the aid of the other respondents, to prosecute said claim, and said state district judge approved a void judgment entry of March 5, 1932 (R. 115-139) for $143,829.96 (R. 20) against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership, and in favor of the John Moffett estate (R. 122), of which Commerce Trust Company claimed to be executor *de bonis non.*

Said judgment entry included a judgment for $101,228.06 (R. 21, 130) against the Oklahoma administrators of an

estate with assets in Oklahoma, notwithstanding said Oklahoma administrators were not parties as such in said District Court in Kansas and there was no property of said estate in Kansas (R. 21). So that the judgments entered were void.

The void judgment entry against Commerce Trust Company, as a Missouri administrator, was based upon the unfounded claim that John Moffett owned 5,530 acres in Chase and Morris counties, Kansas, known as the Hymer Ranch (R. 26), and that he loaned $98,925.00 (R. 143) and other sums to Moffett Brothers partnership, whereas said sums did not belong to John Moffett but aggregated the sale price of the Hymer Ranch owned, not by John Moffett but by Moffett Brothers and Andrews partnership at the time, whose obligations were discharged from said sums, whereas his own signature attached to financial statements (R. 417, 419), and letters (R. 190-194), and a statement of Helen Weede's in writing (R. 155-156), established that he never owned same, as shown by the admitted allegations in paragraph 48 (R. 26-27). The facts as to John Moffett's lack of ownership were fraudulently misrepresented to and concealed from petitioner and testator (R. 144).

Nevertheless, to satisfy said judgment, 8,080 acres of Kansas land (R. 22) and 17,000 acres of Oklahoma land (R. 31, 71), in which petitioner owned a majority interest, were misappropriated to satisfy the said void judgment based on said unfounded claim in favor of the John Moffett estate against Moffett Brothers partnership estate.

Commerce Trust Company, in violation of the law of Missouri limiting its activities as executor and administrator to Missouri, became a trespasser by appearing in other states and misappropriating the assets in such states, in violation of the laws of Missouri and said states.

As a basis, it did so pursuant to void orders obtained by it from the probate court (R. 3-4, 540) of Jackson County, Missouri, and from the district court of Harper County, Kansas. And, in violation of the law, undertook to execute deeds (R. 526-560) pursuant to such void orders, conveying assets into the estate of John Moffett of which it was executor to satisfy void judgment entries against it as Missouri administrator of Moffett Brothers partnership estate.

The Supreme Court of Missouri (after the overt acts had been completed in Kansas), in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751, found that Commerce Trust Company, from start to finish, represented conflicting interests in said litigation (R. 37-50, 692-701) and that Mr. Howard likewise represented Commerce Trust Company in its conflicting capacities in said litigation (R. 699, 701), and that Commerce Trust Company paid Mr. Howard $6,000.00 (R. 25-26, 700-701) for his loyalty to it in one capacity and his disloyalty to it in another in denuding Moffett Brothers partnership estate of its assets, and caused same to be conveyed into the estate of John Moffett, of which Commerce Trust Company was executor.

The overt acts which finally sacrificed said properties and petitioner's interest were credit entries (R. 22) on said void judgment.

Said district judge, sitting in Kansas, without jurisdiction so to do, entered a decree purporting to partition said Oklahoma lands (R. 71, 370-396) for the purpose of misappropriating same by means of his void orders.

John Moffett became Mrs. Weede's husband on February 22, 1921 (R. 354) after he had, on the preceding day, executed his last will (R. 109-110) while still a bachelor. He thereafter died without any child or children

(R. 17), after having devised $5,000.00 (R. 109) to Mrs. Weede, whose name was then Mustard.

By virtue of the Kansas statute of wills, the will of John Moffett was not revoked by his marriage and death without children. So that Mrs. Weede was never entitled to any interest in his estate in Kansas, save that which he bequeathed her, and which she rejected (R. 17).

Nevertheless, on the unfounded assumption that Mrs. Weede was entitled to a one-half interest in John Moffett's estate, the Kansas courts awarded the properties of Thomas S. Moffett and petitioner to Mrs. Weede, in violation of the laws of Kansas, Secs. 22-201, 22-238, 22-240, R. S., 1923.

By the foregoing overt acts, and others alleged in the complaint, petitioner, as a citizen of Missouri, was deprived of the rights guaranteed to her by Clause 1, Section 2, of Article IV of the Constitution of the United States (R. 6, 21, 308), and deprived of the rights guaranteed to her by the provisions of Section 1 of the XIVth Amendment to the Constitution and, as a citizen of the United States, by the Civil Rights Act of April 9, 1866, now Sections 41 and 42, Title 8, U. S. C.

Respondents, between July 14, 1928 (R. 16), and December 23, 1931 (R. 9), instituted 14 groundless suits and claims against petitioner's interest for sums approximating $5,000,000.00 (R. 9), most of which have never been tried, but are still pending on the dockets, over petitioner's attempts to have them terminated (R. 13), in violation of the constitutions and laws of the states in which they were instituted, and by said delay preventing distribution of her testator's estate, depriving her of her property without due process of law, in violation of said federal constitutional provisions.

Many other overt acts are alleged but not restated here, for the reason that they appear in the complaint. And

the truth of the allegations is established by the matters and materials outside the pleadings permitted to be filed by the District Court, and not excluded by it, as well as by respondents' admissions.

The Court of Appeals, contrary to the law of Missouri and as declared by this Court, found that Commerce Trust Company was not an agent of the State of Missouri (Pro. 11) while acting as executor and administrator, and wholly ignored the admitted allegations showing actual knowledge of the law prohibiting appointment of Commerce Trust Company by the "special" probate judge of Missouri (R. 3-4) to administer estates in conflicting capacities; and like knowledge by the district judge of Harper County, Kansas (R. 18-19), establishing that they were parties to the conspiracy, and knowingly and purposefully committed the overt acts which resulted in petitioner's loss, and deprived petitioner of the rights secured and guaranteed to her by the Constitution and laws of the United States.

The Court of Appeals overlooked the nullifying effect of the decision of the Supreme Court of Missouri (345 Mo. 741-751), pleaded as *res judicata* herein (R. 25), which decision was rendered after futile appeals by petitioner to the Supreme Court of Kansas (R. 21), in which court Commerce Trust Company was permitted to represent both sides of the litigation, to-wit: Commerce Trust Company as executor of the estate of John Moffett, which estate was alleged judgment creditor (R. 20-21), against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate as alleged debtor. And after a futile appeal to the federal courts in Kansas (R. 699) to enjoin the enforcement of the judgment against the ancillary administrator of the John Moffett estate, not a party herein, and who never had or could have any title to such claim had it existed, which judg-

ments and opinions of said courts were pleaded by respondents as entitled to full faith and credit and as *res judicata* (R. 661) in said Supreme Court of Missouri, and which latter's nullifying decision (R. 25, 37-50, 692-701) conclusively established the fact that the court proceedings in Kansas as to Kansas and Oklahoma lands misappropriating the property devised and bequeathed to petitioner, were void.

The Court of Appeals, proceeding on the unfounded theory (Pro. 11) that no repository of state power was a party to the conspiracy, or a party to the overt acts aiding and abetting each other in denuding petitioner of her properties in violation of the Constitution, and upon the theory that the action was against private individuals only—notwithstanding the complaint alleged, and by their motions to dismiss respondents admitted that two state judges were parties to the conspiracy—called attention to the opinion in the court of appeals in *Hardyman* v. *Collins,* 183 F. 2d 308, and stated (Pro. 12):

> "Here the complaint fails to show that plaintiff has suffered or will suffer the deprivation of a federal right."

Whereas, petitioner's case is based upon the admitted allegations that the states of Missouri and Kansas through their agents, consisting of two state judges and two state executors and administrators, pursuant to the conspiracy, and by the overt acts aiding each other, the said conspirators misused the powers of said states, in violation of petitioner's federal rights.

The Court of Appeals also found that (Pro. 11):

> "* * * assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, * * * they were not void but, at most, erroneous."

Whereas, under the laws of Missouri, Kansas and Oklahoma, and the decisions of this Court, and of the Court of Appeals for the Eighth Circuit itself, said judgments were utterly void, and especially according to the law declared by said Eighth Circuit in *State ex rel.* v. *Stormfeldz,* 72 F. 2d 595.

Among the groundless actions (R. 9-14) instituted by respondents, pursuant to the conspiracy, was a cause referred to in the record as No. 339,134 (R. 9, 13-14) praying $441,957.71, with interest at six per cent from September 1, 1930, instituted on October 25, 1930, against the partnership of Andrews, Lewis and Moffett by Commerce Trust Company as administrator of the partnership estate of Moffett Brothers and Andrews—of which partnerships T. S. Moffett and L. B. Andrews were then living members (R. 13). The defendant partnership was dissolved by the death of Thomas S. Moffett on December 22, 1930 (R. 6-7). The survivors (Andrews and Lewis) qualified as statutory administrators thereof in the probate court on January 5, 1931 (R. 282).

Said action, if any, survived against the surviving partners, and not against the estate of Thomas S. Moffett as deceased partner. Nor was it ever revived against said estate of Thomas S. Moffett (R. 282). Petitioner on 4 occasions sought to have same dismissed (R. 13), as required by the Missouri statutes, but Commerce Trust Company successfully opposed. About 20 years after institution of said groundless action respondents, through Commerce Trust Company, as a counter-irritant to this action, had the state court appoint a referee in said groundless action in February, 1950—after this cause was appealed to the Court of Appeals. Whereupon petitioner applied for an injunction against Commerce Trust Company to prevent it from interfering with the jurisdiction of the Court of Appeals to grant the relief sought

—which injunction was denied by the Court of Appeals on March 8, 1950, "in all respects" (R. 763). Facts stated in the motion to file (R. 278-279) the proposed supplemental complaint (R. 279-290 and Exhibits "A" to "D" 291-307), and therein, show that said relief should have been granted.

Amongst the overt acts of the conspirators was a secret conference between the Kansas state district judge and emissaries of Commerce Trust Company on February 22, 1932 (R. 183-184, 569, 594) at his home town 310 miles from the homes of said emissaries, concealed for 16 months, pursuant to which Commerce Trust Company became ostensible judgment creditor (R. 102, 114-115) for a total sum approximating $130,000.00, which were means utilized in accomplishing the misappropriation of petitioner's property.

The decision of the Court of Appeals approving the misconduct of Commerce Trust Company in violating the fiduciary obligations which it assumed to petitioner and to all others interested in the estates which it was engaged in administering, was a decision in direct conflict with the law of Missouri as stated in the proceeding of *In re Buder,* 358 Mo. 796, 217 S. W. 2d 561, l. c. 571, thus:

> "The fiduciary relationship of executor and legatees connotes trust and confidence. It contemplates good faith in all transactions rather than mere naked legal obligation. It comprehends integrity, loyalty, fidelity and trustworthiness more than it relates to credit or ability."

It is also in conflict with *Buder* v. *Fiske,* 174 F. 2d 260, l. c. 267, where Judge Stone, late Chief Judge of the Eighth Circuit, cites the Moffett case, 345 Mo. 741-751—which decision of the Supreme Court of Missouri was in conflict with the decision of the Court of Appeals in

approving the conduct condemned by the Supreme Court of Missouri.

As petitioner sought to recover under the provisions of the Civil Rights Act of 1866, as embodied in Sections 41 and 42, Title 8, U. S. C., her right to recover under the decision of this Court in *Hurd* v. *Hodge,* 334 U. S. 24-36, for violation of her rights under said Civil Rights Acts—operates to render the decision of the Court of Appeals in direct conflict with the decision of this Court in *Hurd* v. *Hodge*—thus bringing this case within the provisions, as to conflicting decisions, of paragraph 5 of Rule 38, necessitating the granting of the writ.

The decision of the Court of Appeals is also in direct conflict with the decision of three courts of appeals in other circuits, to-wit: *Picking et al.* v. *Pennsylvania R. Co. et al.,* 151 F. 2d 240 (C. A. 3); *Valle* v. *Stengel,* 176 F. 2d 692, 702 (C. A. 3); *McShane* v. *Maldovan,* 176 F. 2d 1016, 1021, 1022, 1023 (C. A. 6), on the question that persons conspiring with persons who are repositories of state power to deprive a citizen of the United States or any other person within their jurisdiction of their civil rights are liable to the party injured.

Said decision of the Court of Appeals is also in conflict with the opinion in *Culp* v. *United States,* 131 F. 2d 93 (C. A. 8); *Catlett* v. *United States,* 132 F. 2d 902 (C. A. 4); and *United States* v. *Trierweiler,* 52 F. Supp. 4, all holding that persons who conspire with persons exercising state power to deprive a person of his constitutional rights in violation of the constitutional provisions is liable under the provisions of Section 242, Title 18, U. S. C.—all of which conflicts should be settled in this proceeding, and settled in favor of petitioner.

ARGUMENT.

I.

The decision of the Court of Appeals that the void judgments in the proceedings wherein the state courts were without jurisdiction are not void, but only erroneous, conflicts with the decisions of all the other circuits, and the courts of Missouri, Kansas and England, thus necessitating the issuance of the writ under the sound judicial discretion of Rule 38.

An opinion in *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, l. c. 438, holds that this Court, in the exercise of the appellate jurisdiction conferred upon it by Section 2 of Article III of the Constitution, and by the Act of Congress embodied in Section 2106 authorizing it to exercise the same identical jurisdiction always exercised from the beginning of the Government, is governed not by said Constitution and Act of Congress but by said Rule 38. Said language is:

> "Where a case involves no general principle requiring pronouncement but merely its own unique circumstances, such alleviation is inconsistent with the criteria, set forth in Rule 38, governing this court's discretion in granting a writ of certiorari."

The opinion of the Court of Appeals reflects its erroneous and conflicting decision on the point here made. Its language as to this question is (Pro. 11):

> "* * * assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, * * * they were not void but, at most, erroneous."

The state court proceedings thus referred to and alleged in the complaint, which allegations are conclu-

sively established by the matter and material filed under Rule 12 (b) (6) outside the pleadings—which was not excluded by the court—refers to the proceedings in which the void orders and judgment entries were made. The allegations and the proof establish same with reference to state proceedings and judgments without jurisdiction and refer to judgment entries of March 5, 1932 (R. 115-139), wherein the entry purports to show a judgment against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate and in favor of the John Moffett estate of which it was executor for $143,829.96; and an entry for $101,228.06 against the Oklahoma administrators of a partnership estate in Oklahoma—in neither of which instances were there any assets of said estates being administered by said Missouri and Oklahoma administrators within the jurisdiction of said district court of Harper County, Kansas—nor in the State of Kansas—but were in the states of which they purported to be administrators.

For which reasons said judgment entries were absolutely void and complete nullities, under the law as declared by the Supreme Court of Kansas in *National Bank of Topeka* v. *Mitchell,* 118 Pac. 2d 519, l. c. 522-523, 154 Kan. 276, 281-282, citing and following numerous decisions of this Court, and those of other circuit courts of appeals:

> "Appellee cites numerous authorities which support the principles above stated. We add only a few among the countless others which might be cited: *Rose* v. *Himely,* 4 Cranch. 241, 277, 2 L. Ed. 608, 619; *Pennoyer* v. *Neff,* 95 U. S. 714, 722, 24 L. Ed. 565, 568; *Frick* v. *Commonwealth of Pennsylvania,* 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316; 11 Am. Jur. 296-298; Restatement, Conflict of Laws, sec. 512 (b); 11 R. C. L. 450, 451, sec. 555; *Burrowes* v. *Goodman,* 2 Cir., 50 F. 2d 92, * * *"

"The case of *Brown* v. *Fletcher's Estate,* 210 U. S. 82, 52 L. Ed. 966, cited by appellee, applies the broad principles above stated to a situation fully in line with the one before us. To quote pertinent passages therefrom would unduly prolong the opinion. We call particular attention to the quotation therein from Chief Justice Marshall's opinion in *Rose* v. *Himely, supra,* and to what was said in *Pennoyer* v. *Neff, supra,* as quoted in *Brown* v. *Fletcher* in 52 L. Ed., at page 970.

"We conclude that the trial court was without jurisdiction to revive the action against the Oklahoma executor.

"The judgment is affirmed."

The exhaustive opinion in *Knoop* v. *Anderson,* 71 F. Supp. 832-852, on the question of the rendition of judgments by a state court against a nonresident executor or administrator includes the countless authorities referred to by the Supreme Court of Kansas in the above opinion. The said judgment entry against Commerce Trust Company as administrator of Moffett Brothers partnership, and in favor of the John Moffett estate of which it was executor—and prosecuted by it through the same attorney —has been also conclusively established to be void by the decision of the Supreme Court of Missouri in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751.

The fundamental law of England on this question was enacted by its Parliament in the year 1297, 42 Ed. III, 3 c. i., which statute provides:

"And we will, that if any judgment be given from henceforth contrary to the points of the charters aforesaid by the justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone, and holden for nought."

In Part Two Coke's Institutes 527 his comment is

> "Whatsoever judgment is given against the statute of Magna Charta, * * * is made void by this act, * * *"

Said English statute is made part of the common law of Missouri, and made applicable herein by Section 49a, Title 8, U. S. C.

The Missouri statute, Section 645, R. S. 1939, provides that:

> "* * * all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this State, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, * * *"

Said decision as represented in said declaration by said Court of Appeals conflicts with Section 1 of the XIVth Amendment and all the provisions thereof.

The conflict of the decision of the Court of Appeals with the decisions of this Court, and the courts generally, is emphasized by the classic declaration on this subject by this Court in *Elliott* v. *Peirsol*, 1 Pet. 328, l. c. 340:

> "Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in

> opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

It follows that the district judge of the Harper County court, Commerce Trust Company, B. C. Howard and Orlin A. Weede, who were concerned in executing such judgments or sentences in this case are trespassers within the meaning of the law, and liable to petitioner on this ground alone. And, since the acts of the accountants and Mrs. Weede cooperating with them, pursuant to the conspiracy, occasioned the loss, then they are likewise liable.

The Supreme Court of Kansas emphatically recognized the force of the above opinion in *Elliott* v. *Peirsol,* 1 Pet. 328, which authority, with many others, was cited in *Mastin* v. *Gray,* 19 Kan. 458, l. c. 462-463, where it was held that under said authorities

> "• • • any judgment rendered without jurisdiction may be impeached in any proceeding; and that in so doing, anything contained in the record purporting to give or prove such jurisdiction • • • may be impeached and contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be true or false. *Elliott* v. *Peirsol,* 1 Pet. 328."

The Missouri court in *Fithian* v. *Monks et al.,* 43 Mo. 502, l. c. 521, reads:

> "The law in regard to void and voidable judgments has been examined and laid down by the Supreme Court of the United States in a series of well-considered decisions. (*Vorhees* v. *Bank of U. S.,* 10 Pet. 474; *Elliott* v. *Piersol,* 1 Pet. 340; *Hickey* v. *Stewart,* 3 How. 750; *Shriver* v. *Lynn,* 2 How. 43.) In *Vorhees* v. *Bank of U. S.,* Mr. Justice Baldwin said: 'If not warranted by the constitution or law of

> the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law which can properly be deemed to have been done *coram non judice*—that is, by persons assuming the judicial function in the given case without lawful authority.' So, in *Shriver* v. *Lynn, supra,* it is declared that a sale ordered by a court in a case where it had not jurisdiction must be considered as inadvertently done, or an unauthorized proceeding, and in either branch of the alternative as a nullity."

The State of Missouri through its "special" probate judge made a void order appointing Commerce Trust Company to represent estates the interests of which were in conflict, immediately after having revoked the letters testamentary granted to Thomas S. Moffett by the duly elected judge, on the ground that the interests of said estates were in conflict. Thus knowingly and purposefully denying the equal protection of the laws and due process of law, and discriminating in favor of Commerce Trust Company and its confederates (*State to Use Miller's Adm'r* v. *Bidlingmaier,* 26 Mo. 483; *State to Use Mueller's Adm'r* v. *Reinhardt,* 31 Mo. 95).

In the first case cited the Missouri Supreme Court said, l. c. 485:

> "There is no other mode of treating such irregularities than by regarding the proceedings in which they occur as nullities."

In the second case cited, the Missouri court in syllabus 1 said:

> "1. Where the interests of two estates in course of settlement conflict—as where there is a demand in behalf of one estate to be presented for allowance against the other—the same person cannot act as the administrator of both parties in the matter of ob-

> taining an allowance of the demand; should a demand be allowed under such circumstances against one of the estates, the proceeding will be regarded as a nullity. (*State to Use, &c,* v. *Bidlingmaier,* 26 Mo. 483, affirmed.)"

The State of Kansas, through its district judge of Harper County, made void orders and void judgment entries with reference to properties in Kansas and Oklahoma, pursuant to which respondents were enabled to misappropriate all of Moffett Brothers lands in Kansas and Oklahoma, in which petitioner had a majority interest. And, by their acts and the institution of groundless suits, and maintaining suits on the dockets of the courts for over 20 years for approximately $5,000,000.00 against petitioner's interest destroyed the Moffett credit (R. 28) and occasioned the loss of some 30,000 additional Kansas acres—all of which was done pursuant to such void orders and judgments.

The Kansas law is identical with the above Missouri rule (*Peyton* v. *Chase County National Bank,* 124 Kan. 763, l. c. 766; *State ex rel.* v. *Bradbury,* 123 Kan. 495, 256 Pac. 149, and *Yager* v. *Liberty Royalties Corp.,* 123 F. 2d 44). Yet Kansas denied petitioner in violation of Secs. 41 and 42, Title 8, U. S. C.

> "• • • the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; • • •"

thus denying her privileges and immunities as a Missouri citizen guaranteed by Article IV, Sec. 2, Clause 1 (*Maxwell* v. *Bugbee,* 250 U. S. 524, l. c. 537) and by said Section 41.

So does this, and all Federal courts, apply the same rule as to conflicting interests (*Phoenix Ins. Co.* v. *Erie*

Transportation Co., 117 U. S. 312, l. c. 322; *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, l. c. 777; *Defense Supplies Corp.* v. *United States Lines Co.*, 148 F. 2d 311, l. c. 312).

The finding of the Missouri Supreme Court decision that Commerce Trust Company and B. C. Howard represented conflicting interests in the Kansas courts (345 Mo. 741-751, l. c. 750, 751) (R. 48, 49, 699, 701) conclusively established that said judgments were void.

Other factors rendered the judgments against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate, and against the Oklahoma administrators of assets of a partnership estate located in Oklahoma, void. The facts alleged and admitted in the following quotation apply in both instances (R. 69):

> "The contention, which is the very core of plaintiffs' case, is that the Kansas judgments were void because Commerce Trust Company, administering the partnership estate of Moffett Brothers, intervened in the Kansas litigation without having title to or possession of any assets of that partnership in the State of Kansas.

Respectfully submitted,

JAMES E. GOODRICH,
EUGENE E. BOWERS,
HUGH M. HILLER,
Attorneys for Defendant Commerce Trust Company."

In *McMaster* v. *Gould*, 240 N. Y. 379, with the concurrence of Justice Cardoza, who delivered the opinion in *Helme* v. *Buckalew*, the following paragraphs state the applicable law, l. c. 794, 795:

> "The reasoning in *Helme* v. *Buckalew, supra*, clearly indicates that the law is unconstitutional as to foreign administrators. Following the leading case, consistency requires us to say that the statute registers a futile effort to bind foreign administrators by a judgment *in personam*, and as to them is unconstitutional in its inception. The foreign administrator as the official of another sovereignty exists only by virtue of the statute of another state, and has no legal existence in this state. (p. 794)
>
> "The concept of a foreign nonresident executor without assets in this state as present in his fiduciary capacity is as difficult as the discarded concept of a foreign corporation as present in this state merely because one of its directors is found here. *Riverside & D. River Cotton Mills* v. *Menefee*, 237 U. S. 189, 59 L. Ed. 910, 35 Sup. Ct. Rep. 579. Regarding the foreign executor as a trustee rather than as an owner, even his presence in the state as an individual does not imply his presence as executor unless assets in the state or other trust duties to be performed here make his presence an incident of his fiduciary capacity, and he must be present in the state as executor before judgment *in personam* can be entered against him.
>
> "To the suggestion that no harm would be done in allowing judgment to be entered in New York in all such cases, the answer is that the very act of fixing, without a hearing by judicial action, a sum due, would in and of itself be repugnant to the due process clause. *Riverside & D. River Cotton Mills* v. *Menefee, supra.*" (p. 795)

II.

The Court of Appeals has erroneously decided that state court action is immunized from the operation of Section 1 of the XIVth Amendment, and of Clause 1, Section 2, Article IV of the Constitution, and the Civil Rights Act, and thereby rendered a decision in conflict with the decisions of this Court, and the Courts of Appeals of other circuits.

Said decision of the Court of Appeals ignores the law stated by this Court in *Shelley* v. *Kraemer*, 334 U. S. 1, l. c. 18:

> "* * * it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision within the meaning of said language under Rule 38, paragraph 5 (b).

Both the District Court and Court of Appeals wrote opinions deciding that never in any instance can a litigant recover for loss sustained and occasioned by the acts of a state judge in depriving a citizen of the United States of his property without due process of law, or by a denial of the equal protection of the laws, in violation of the XIVth Amendment, or in violation of the rights of a citizen of one state in another state, included in the guaranty of the privileges and immunities described in Clause 1, Section 2, Article IV of the Constitution.

This decision was in direct conflict with the opinions in *Picking et al.* v. *Pennsylvania R. Co., et al.*, 151 F. 2d 240, and *McShane* v. *Maldovan*, 172 F. 2d 1016, and

Shelley v. *Kraemer,* 334 U. S. 1, l. c. 18, *supra,* and *Screws* v. *United States,* 325 U. S. 91.

In the Picking case, *supra,* l. c. 250, it is said:

> "Section 1 of the third Civil Rights Act explicitly applied to 'any person.' R. S. Section 1979 applies to 'every person.' We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity."

In *McShane* v. *Maldovan* (C. A. 6), *supra,* the opinion of the court was written by one of the judges sitting by assignment in the ninth circuit in *Hardyman* v. *Collins,* 183 F. 2d 308, and recovery was sought under Sections 43 and 47, Title 8, U. S. C. The opinion recites, l. c. 1017:

> "Appellant brought her action in the district court, charging appellees with conspiring to obstruct and defeat the due course of justice in the State of Michigan, with intent to deny to her the equal protection of the laws, and for the purpose of depriving her of her right to be tried in accordance with due process of law. * * *
>
> In appellant's complaint she alleged that the conduct of the appellees was willful and malicious and designed to deprive her of her rights, privileges, and immunities as secured by the Fourteenth Amendment to the Constitution of the United States."

Citing and quoting from the Screws and Picking cases, *supra,* the court said, l. c. 1019:

> "The issue before us is whether a conspiracy entered into between state officers and others acting under color of state law to deprive a person of constitutional rights secured under the Fourteenth Amendment, and resulting in deprivation of such rights, gives rise to an action for damages against

the conspirators under Title 8, U. S. C. A., sections 43 and 47."

The court concluded, l. c. 1023:

> "In the light of the authorities above set forth, we are of the opinion that the allegations of the complaint stated a cause of action over which the district court had jurisdiction.
>
> The judgment of the district court dismissing the case is, accordingly, reversed, and the cause is remanded to the district court for trial."

In *Screws* v. *United States,* 325 U. S. 91, this Court said, l. c. 110:

> "It is said that we should abandon the holding of the Classic Case. It is suggested that the present problem was not clearly in focus in that case and that its holding was ill-advised. A reading of the opinion makes plain that the question was squarely involved and squarely met. It followed the rule announced in *Ex parte Virginia,* 100 US 339, 346, 25 L ed 676, 679, that a state judge who in violation of state law discriminated against negroes in the selection of juries violated the Act of March 1, 1875, 18 Stat. 335, 336 c 114."

If Rule 38, par. 5 (b), providing

> "Where a circuit court of appeals has rendered a decision in conflict with a decision of another circuit court of appeals on the same matter , * * * or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

means anything with reference to the issuance of a writ

of certiorari in any case, then this is the case to which said provision should be applied, under the foregoing authorities.

III.

Petitioner, as a citizen of Missouri in Kansas and Oklahoma, was denied the rights secured to her by Article IV, Section 2, Clause 1, of the United States Constitution; and, as a citizen of the United States, by the Civil Rights Act of April 9, 1866, particularly that part thereof embodied in Section 42, Title 8, U. S. C.; and therefore the complaint alleges a claim on which relief should be granted against respondents without reference to the XIVth Amendment.

The Civil Rights statute of April 9, 1866, embodied Section 42, Title 8, U. S. C. (R. S. U. S., Sec. 1978) which provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Oyama v. *California,* 332 U. S. 633-689, quoting the above statute in a footnote, states, l. c. 640:

> "By Federal statute, enacted before the Fourteenth Amendment, but vindicated by it, the states must accord to all citizens the right to take and hold real property."

Hurd v. *Hodge,* 334 U. S. 24, l. c. 30-31, 32, states:

> "Section 1978 of the Revised Statutes, derived from Section 1, of the Civil Rights Act of (April 9) 1866, provides:
>
> 'All citizens of the United States shall have the same right, in every State and Territory, as is

> enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'
>
> All the petitioners in these cases, as found by the District Court, are *citizens of the United States.*"
>
> * * * * * *
>
> "Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land."

The Court held that in the District of Columbia the Civil Rights Acts gave the same protection to *citizens* of the United States as did the XIVth Amendment to citizens of the United States in any *state.* Of the action of the district court there, it said that it—as to the Act of April 9, 1866, l. c. 33:

> "'* * * denies rights intended by Congress to be protected by the Civil Rights Act and that, consequently, the action cannot stand."

Petitioner and her testator were citizens of the United States and of Missouri. Said Section 42 vested rights in citizens of the United States as citizens.

There are a few rights assured to citizens of the United States as citizens by the United States Constitution and laws, separate and distinct from the rights secured to

persons by the XIVth Amendment, which Congress had power to protect by Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C.—among which rights are those secured to petitioner as a citizen of Missouri while in Kansas and Oklahoma by Article IV, Section 2, Clause 1, of the Constitution.

This power antedates and does not depend upon the XIVth Amendment. And the question as to whether or not petitioner has a right to recover herein does not, therefore, involve the question of whether said Amendment only applies to state action. Such few Federal rights do not necessarily depend on said Amendment to the Constitution, but arise out of said statutes conferring capacity upon citizens of the United States to acquire, hold, own, enjoy and convey property. That citizens have been protected by such statutes has been incontrovertibly established by the decisions of this Court, largely in cases applying the criminal law parallels of said sections.

This Court, in *United States* v. *Waddell,* 112 U. S. 76, held that individual defendants who conspired to deprive a citizen of the United States of his property rights in his homestead, acquired and secured by Acts of Congress, alone, were liable for their wrongful acts. In said opinion the following appears, l. c. 77:

> "The first and second counts of the information undertakes to set out a conspiracy of the defendants, under section 5508, to deprive or hinder Burrell Lindsey, a citizen of the United States, of the right to establish his claim to certain lands of the United States under the Homestead Acts."

Section 5508 contained language similar to that in Section 47 (2) and (3), at l. c. 77-78.

Said decision of this Court recognizes the validity of an Act of Congress which subjected conspirators to lia-

bility for depriving a citizen of the United States of property and property rights secured to him by said Act of Congress alone, without reference to any constitutional provision—whether said conspirators were, or were not, exercising state power.

So that, applying the principle there applied, the complaint in this case alleges facts authorizing petitioner to recover under said Civil Rights Acts, whether respondents exercised state power or not.

United States v. *J. C. Williams et al.*, October term, No. 26, quotes the opinion of the Court of Appeals for the fifth circuit on its page 2 as follows:

> "It held that in the conspiracy provision of Section 19 'the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the clause of the Fourteenth Amendment.' 179 F. 2d 644, 648."

While the right in *United States* v. *Waddell*, 112 U. S. 76,

> "* * * did not pertain to United States citizenship"

as stated in the majority opinion in the Williams case (No. 26), yet the right of petitioner herein, under Section 42, Title 8, U. S. C., does depend upon her alleged (R. 2) and admitted United States citizenship.

That opinion states, p. 10:

> "In *United States* v. *Waddell*, 112 U. S. 76, interference with the right to establish a claim under the Homestead Acts brought the offender within Section 241. The right did not pertain to United States citizenship; but since it was 'wholly dependent upon the act of Congress,' obstructing its exercise came 'within the purview of the statute and of the con-

> stitutional power of Congress to make such statute.' 112 U. S. at 79, 80."

Manifestly Congress has at least as much power to protect the property rights of a citizen of the United States by Sec. 42, U. S. C., as it had to protect the homestead of a person who is not a citizen. *Hurd* v. *Hodge*, 334 U. S. 24, points out that, l. c. 31:

> "All the petitioners in these cases * * * are citizens of the United States,"

thus showing that Section 42, enacted for the protection of citizens of the United States only, was the basis of the decision.

A fortiori, the dissenting opinions of the four Justices who dissent in said Williams case sustain petitioner's claim stated in the complaint.

These circumstances establish petitioner's right to recover against all persons who participated in the conspiracy and in the overt acts which deprived her of the rights secured by said Civil Rights Acts, whether some of them could be held to be or not be persons exercising state power under the decision in *Hurd* v. *Hodge*, *supra*, and *Williams* v. *United States*, No. 26, October Term, 1950.

The allegation in the complaint (R. 2-3) as to this case arising under the Civil Rights Act of 1866 (now Sections 41 and 42, Title 8, U. S. C.) brings this case strictly within the decision in *Hurd* v. *Hodge*, 334 U. S. 24-36, and establishes direct conflict between the decision of the Court of Appeals (C. A. 8) and *Hurd* v. *Hodge*, necessitating the issuance of the writ.

Shelley v. *Kraemer*, 334 U. S. 1, at l. c. 11, states:

> "Thus, Section 1978 of the Revised Statutes, 8 U. S. C. A., Sec. 42, 2 F. C. A., Title 8, Section 42,

> derived from Section 1 of the Civil Rights Act of 1866, which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides * * *"

also then quoting Section 42, Title 8, as above.

Under the foregoing authorities, respondents are liable as individuals without reference to whether some of them were, or were not, exercising state power.

IV.

Petitioner is entitled to certiorari under Rule 38, paragraph 5, of this Court, because the decision of the Court of Appeals is in conflict with the decisions of three Courts of Appeals of other circuits on the same matter.

The Court of Appeals' decision conflicts with the decisions of three (3) Courts of Appeals of other circuits on the same matter, in holding that no cause of action was alleged, contrary to said decisions.

Respondents and others (Pro. 4) were parties to a conspiracy to which Missouri and Kansas state officials were also parties.

The complaint alleges (R. 3, Pro. 4):

> "Those conspirators who were not officials of said states materially and physically participated in said conspiracy, and in all the overt acts of said state officials done pursuant to said conspiracy, and have joined in and adopted the said conspiracy as their own."

In *Picking et al.* v. *Pennsylvania R. Co. et al.*, 151 F. 2d 240, at l. c. 249-250 (C. C. A. 3) it is said:

> "But if, as the plaintiffs assert, this defendant 'materially and physically participated in' all the alleged unlawful acts of September 15, 1941, it may

> have joined in, or as the plaintiffs put it, 'adopted' the conspiracy as its own."

The conspirators who were the repositories of state power were a Missouri "special" probate judge, a Kansas state district judge, and Commerce Trust Company as an executor and administrator.

In *Valle* v. *Stengel*, 176 F. 2d 697 (C. A. 3), it was held that the fact that a law enforcement officer of the state acted in defiance of its law, l. c. 702:

> "• • • will not serve as a defense and, since the complaint alleges in effect that he aided and abetted the corporate defendant and the managing defendants, his actions may be attributed to them and treated as their own."

In *McShane* v. *Maldovan*, 172 F. 2d 1016, at l. c. 1019 (C. A. 6), it was said:

> "The issue before us is whether a conspiracy entered into between state officers and others acting under color of state law to deprive a person of constitutional rights secured under the Fourteenth Amendment, and resulting in deprivation of such rights, gives rise to an action for damages against the conspirators under Title 8, U. S. C. A., Sections 43 and 47."

Discussing and following *Picking* v. *Pennsylvania R. Co.*, at l. c. 1022, it is said:

> "The court concluded that the plaintiff had stated a cause of action under the statute in alleging that the state officials had conspired with another to deprive the appellant of her rights under the Fourteenth Amendment, under color of law."

At l. c. 1021 it said of *Picking* v. *Pennsylvania R. Co.:*

> "That case was decided squarely upon the provision of the statute that is before us in this case, 8 U. S. C. A., Sec. 43."

At l. c. 1023 it is said:

> "The allegations of the complaint in the instant case charged state officers and others with combining in a willful and malicious conspiracy to deprive appellant of the rights secured to her by the Fourteenth Amendment. * * * In the light of the authorities above set forth, we are of the opinion that the allegations of the complaint stated a cause of action over which the district court had jurisdiction."

V.

The acts of Commerce Trust Company injuring petitioner and testator were done by it under color of state law, to-wit: as an executor and administrator of the State of Missouri claiming power by virtue of an appointment under the statutes of the State of Missouri, and because of its own misappropriation, and permitting others to misappropriate, the property of testator and petitioner, which rendered it and its confederates liable under the provisions of Section 43, Title 8, U. S. C.

Throughout the ages, an administrator has always been regarded as the agent of the state. For such official enables the state, in the exercise of its sovereign power, to transfer the properties of persons who die to those persons to whom the state authorizes its transfer as pointed out in *Leakey Adm.* v. *Maupin,* 10 Mo. 368, at l. c. 370:

> "In ancient times when a man died intestate, the King, as *parens patriae,* took possession of his effects to be employed in defraying the expenses of his

> burial, paying his debts, and for the support of his wife and children or other kin. The execution of this trust was devolved on the clergy, and many abuses growing out of their conduct in relation to it, the Statute of Westminster II, 13th Ed. I, which was said to be in affirmance of the common law, enacted that the ordinary should pay the debts of the intestate as far as his goods extended, in the same manner the executors were bound in case the deceased had left a will. But the residuum after payment of debts remained in the hands of the ordinary to be applied to any purposes his conscience might approve. Great abuses arising under the exercise of this power, the Legislature again interposed, and by the statute of 31st Edw. III, required the ordinary to depute the next and most lawful friends of the intestate to administer his goods. This is the origin of administration in England."

In *Riley* v. *New York Trust Co.*, 315 U. S. 343, l. c. 354, this Court states:

> "It seems quite obvious that the administrator c. t. a. appears in Delaware as an *agency of State of New York,* and not as the alter ego of the beneficiaries of the Hungerford estate. * * *
>
> A state is interested primarily not in the payment of particular creditors, nor in the succession of heirs or beneficiaries, as such, but in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries. In a society where inheritance is an important social concept, the managing of decedent's property is a *sovereign right* which may not be readily frustrated."

In *State ex rel.* v. *Bird,* 253 Mo. 559, l. c. 583-584, following *Maxey* v. *Bell,* 41 Ga. 183, the court recognizes the offices of administrators and guardians as public trusts.

In *State ex rel. Burnes Nat'l Bank* v. *Duncan*, 302 Mo. 130, it is said, l. c. 139:

> "It has always been held that the power to regulate the acquisition and transfer of property, descents and distributions, the devolution of estates, etc., is exclusively within the jurisdiction of the State. (*Overly* v. *Gordon*, 177 U. S. 214; *Pennoyer* v. *Neff*, 95 U. S. 714.) Trustees, executors and administrators are the instruments through which the State regulates and controls certain classes of property. This is recognized by the Federal courts in the cases just mentioned. It naturally follows that the State, by statute, has the right to say, and the state courts have the right finally to determine *what agencies may exercise such control without acting in contravention of the state law.*" (Italics ours.)

Section 11,801, R. S. Mo., 1919 (now Sec. 363.200, R. S., 1949) authorizes a trust company to become an executor or administrator:

> "* * * (3) * * * in the manner now provided by law for the appointment of individuals to any such office."

In *In re Petition of Mulford*, 217 Ill. 242, on the question of state agency and state sovereignty, the court said, l. c. 246, 247, 248, 249:

> "The State, acting in its sovereign capacity, by appropriate legislation regulates and controls the devolution of property after the death of an owner." (l. c. 246.)
>
> "The judicial procedure thus established to regulate and control the devolution of property by will is the exercise of governmental power and duty by the State, and executors acting by force of such procedure exercise functions that are official in character. The

position is denominated an 'office' in sections 31 and 36 of the Administration act." (l. c. 247.)

"An executor receives formal letters testamentary, which constitute his commission as an officer. Before such letters may issue he must take the oath of office prescribed by the statute and must execute a bond to the People of the State of Illinois conditional for the faithful performance of the duties of his office. * * *" (l. c. 247.)

"An executor is a public officer. (Wharton on Conflict of Laws, sec. 552; Woerner on Law of Administration, sec. 172.)" (l. c. 248.)

"The 'privileges and immunities' which are protected by the constitutional inhibition concern the personal and private rights of the citizen, such as his right to acquire and possess property, to pursue ordinary callings and secure happiness and safety, etc., * * *" (l. c. 248.)

"The power to control property of a deceased person to the end that it shall be applied to the payment of the just debts of the decedent, for the protection of those who were peculiarly dependent upon him and who may otherwise become burdens on the public, and the remainder be transmitted to the persons or to the purposes the testator desired it to go or be applied to, rests in the state in its sovereign capacity. In exercising this governmental function the State has the clear right to call to its aid and to invest with official power only such persons as are residents within its territorial limits. No nonresident enjoys the 'privilege or immunity' to participate, as an officer, in the administration of the affairs of the State, nor has he any right of 'liberty or property' in the fees or emoluments of any such office or public position." (l. c. 248-249.)

Commerce Trust Company was fully cognizant that *In re Mulford* correctly states the law as it is in Missouri, as shown by the decision of the Supreme Court of Missouri in *Commerce Trust Co.* v. *Ellis*, 258 Mo. 702, wherein that court agreed with the contention of Commerce Trust Company that *In re Mulford* correctly states the law as it is in Missouri, l. c. 706-707:

> "Waiving the suggestion of respondent that the act in question is unconstitutional * * *, and presuming, as is our duty in the first instance, it to be a valid act * * *, as is also urged by appellant (*Emmons* v. *Gordon*, 140 Mo., l. c. 500; *In re Mulford*, 217 Ill. 242); * * *"

Part Second of Woerner on the American Law of Administration, 3rd Ed., page 671, begins:

> "OF THE INDUCTION TO THE OFFICE OF EXECUTOR AND ADMINISTRATOR."

In paragraph 10 on page 10 of said work it is said:

> "They are in the full sense officers of the law, and of courts organized and having jurisdiction for the especial purpose of aiding and controlling them."

Said text, in a note, cites *Byers* v. *McAuley*, 149 U. S. 608, and proceeds:

> "But they are not state officers in the usual sense; *Stevens* v. *Larwill*, 110 Mo. App. 140, l. c. 157. An administrator is not an agent of his intestate but a public trustee of defined and limited powers; *Henry* v. *Henry*, 73 Neb. 746, 107 N. W. 789."

Missouri law is controlling. The futile citation of *Wilcox* v. *Horan*, 178 F. 2d 162, 165, shows there was no administrator involved and no Colorado law on the point as to a

guardian. Herein the Missouri law is the best evidence as to whether or not its executors and administrators are its agents.

Today, as in the days when the ordinary administered assets of an estate, Commerce Trust Company as a Missouri administrator, is liable individually as a trespasser and of its own wrong for interfering with and causing the loss of the assets of estates in other states, as did Commerce Trust Company with a vengeance in Kansas and Oklahoma.

In *Emmons* v. *Gordon,* 140 Mo. 490, l. c. 498, it is held that a Missouri administrator could not take possession of property of an estate in any other state "without becoming a trespasser."

Coke's comment on Chapter 19, Westminster II, is:

> "If the ordinary take goods of the intestate, being out of his diocese, he shall not be charged as ordinary by this act, because he taketh them of his own wrong, and not as ordinary, in which right he is to be charged by this act."
>
> Citing 12 R. 2 Administrat, 21.
> Lib. 5. fo. 29, the Princes Case
> 9 Eliz. Dier 255, 256. lib. fo.
> Sir Moyle Finches Case.

This Court and those of Missouri and Kansas have similarly ruled in:

Fenwick v. *Sears' Administrators,* 1 Cranch. 259.
Dixon's Executors v. *Ramsey's Executors,* 3 Cranch. 319, l. c. 323-324.
Vaughan v. *Northup,* 15 Pet. 1, l. c. 6.
Stacy v. *Thrasher,* 6 How. 44, l. c. 60.
Ingle v. *Jones,* 9 Wall. 486, l. c. 495.
Johnson v. *Powers,* 139 U. S. 156, l. c. 159, 162.

Brown v. *Fletcher's Estate,* 210 U. S. 82.
Ingersoll v. *Coram,* 211 U. S. 335, l. c. 361-362.
Bank v. *Dowdy,* 175 Mo. App. 478, l c. 482.
Richardson v. *Busch,* 198 Mo. 174, l. c. 183-184.
Bank of Seneca v. *Morrison,* 200 Mo. App. 170, l. c. 178.
National Bank of Topeka v. *Mitchell,* 154 Kan. 276, 118 Pac. (2d) 519.

Section 49a, Title 8, U. S. C., authorized the District Court to utilize the common law of Missouri in giving effect to the Civil Rights Acts. So that, that common law, as stated by Coke and above applied, in combination with the Civil Rights Acts, authorized petitioner to recover, since both Commerce Trust Company and the Missouri "special" probate judge, and the Kansas district judge, were parties to the conspiracy and participated in the unlawful overt acts of Commerce Trust Company.

Section 8026, R. S. Mo., 1939, providing for the appointment of, and exercise of, powers as executor, and in other fiduciary capacities of Missouri trust companies, in paragraphs 3, 7 and 11 refers to the OFFICE of executors and administrators as an "OFFICE."

In *In re Irwin's Estate,* 123 Mo. App. 508, in discussing a contract with reference to an appointment of an administrator, the court said, l. c. 512, 513:

> "This was trafficking in the OFFICE of the administrator, which was void as being against public policy. 'A promissory note, where the consideration is an agreement to procure a responsible party and have him appointed administrator of an estate, is void as against public policy.' (*Porter* v. *Jones,* 52 Mo. 399.) * * * 'Traffic in public OFFICE is against good morals and contrary to public policy.' (*Basket* v. *Moss,* 115 North Carolina 448.)

> While an administrator may, lawfully, for a valuable consideration agree with the heir to render services as such for a compensation other than that provided by law, he cannot make any such agreement for a consideration pertaining to his right to obtain or retain that OFFICE, for that would amount to trafficking for the position and contrary to public policy."

In *Brandenburger* v. *Puller,* 266 Mo. 534, at l. c. 540, the court said:

> "The case of *Porter* v. *Jones,* 52 Mo. 399, was determined upon grounds of public fraud, the trafficking in appointments of administrations, and the corrupt procuring of an appointment to an OFFICE of trust."

Sections 43 and 47, Title 8, U. S. C., and Section 20, Criminal Code, are shown, by the legislative history of both, to be *in pari materia.* In *Southland Gas Co.* v. *Bayley,* 319 U. S. 44, 47, the necessity for similarity of construction of statutes *in pari materia* is shown. In *Picking* v. *Pennsylvania R. Co.,* 151 F. (2d) 240, 248-249 (C. A. 3), the court held that the Civil Rights sections (civil and criminal) relating to acts under color of state law are *in pari materia,* and that the civil section must be given the construction theretofore given to the criminal sections in *Screws* v. *United States* by this Court.

In *Williams* v. *U. S.,* No. 365, October Term, 1950, affirming the Court of Appeals in 179 F. (2d) 656, the court held that a private detective, who was given a courtesy card by the city of Miami and who was neither in the employ of the city nor state but committed the acts described in the opinion in violation of Section 20 of the Federal Criminal Code, in the presence of one Ford, a

policeman, was found to have "a semblance of policeman's power from Florida" by reason of said acts.

It follows that, in addition to the state judges exercising state power, Commerce Trust Company was a state agent and was exercising state power.

Of the "Trinity of Rights" protected by the due process clause of the XIVth Amendment (*State* v. *Julow,* 129 Mo. 163), it has been ruled that if state officers charged with the duty of protecting life and liberty of others themselves destroy same, or permit others to do so, they are liable both civilly and criminally (*Screws* v. *United States,* 325 U. S. 91; *Catlett* v. *United States,* 132 F. 2d 902; *United States* v. *Trierweiler,* 52 F. Supp. 4).

In protecting life and liberty, the state is engaged in the exercise of its governmental or sovereign power. So that, its agents and officers are liable under the Civil Rights Acts, when acting under color of state law they are false to the trust reposed in them.

By the same token, when the state is engaged in the exercise of its governmental or sovereign power in transferring the properties of the dead to the living who are entitled thereto by virtue of the laws of the latter, and when the state selects instruments and agents to whom it gives custody of such property, then, if such agents are false to their trust, and false to their fiduciary obligations, as was Commerce Trust Company herein, then they are likewise liable under the Civil Rights Acts for either destroying the property thus confided to them, or permitting others to misappropriate it, and are liable therefor.

The decision of the Court of Appeals to the effect that Commerce Trust Company, as executor and administrator, is not amenable under the Civil Rights Acts is a decision which is contrary to the humane principle that no person shall unlawfully suffer a property loss without a remedy, which has always been recognized by this Court and by

the English common law. This is evidenced by the opinion of this Court in *Marbury* v. *Madison*, 1 Cranch. 137, wherein it says, l. c. 163:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * *
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for a violation of a vested legal right."

Even under the English law, the immunity which protected the chief of the state never protected the officers of the state whose duties were fixed by law, and who violated that law. Thereupon the opinion proceeds, l. c. 165:

> "After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. 3, p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy: but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

The Court of Appeals and the District Court applied the rule of English law to the complaint in this case, that "personal injury from the King to a subject is presumed to be impossible," and based their erroneous decisions that the complaint failed to state a cause of action on that principle by placing judges in the same regal position as the Monarch of England, who could do no wrong, con-

trary to the opinion of Justice Sutherland, concurred in by the late Chief Justice Stone, in *United States* v. *Manton*, 107 F. 2d 834, and that in *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, and other like cases, which establish the truth that neither this, nor the other Federal courts, subscribe to such erroneous doctrine.

The maxim or principle that the king can do no wrong (Blackstone, Book 3, p. 255) has no place in American constitutional law, yet if a right was invaded by the king in England the law furnished the subject

> "* * * with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute; and as it presumes that to *know* of the injury and to *redress* it are inseparable in the royal breast, it then issues, as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved." (Blackstone, Com. Book 3, p. 256.)

In this country there is no king to order the judges to do justice to an aggrieved party, but there is a constitution which constitutes a perpetual mandate to the judges to do justice to the party aggrieved. As said in Note 1, Blackstone's Com. Book III, p. 256:

> "The state itself, which is the sovereign people in corporate organization, can no more wrong an individual with impunity than can a private person."

After pointing out that certain kinds of state officers were not liable, the Chief Justice proceeds, in *Marbury* v. *Madison, supra,* l. c. 166:

> "But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of

> those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."

Respondents and their confederates, in violation of the law thus recognized and declared by this Court, at their discretion "sported" away the vested rights of petitioner and testator, in violation of a principle of the common law which was in force long before the enactment of the Civil Rights Acts. And, since an executor or administrator is an officer of the law, it is subject to the application of that principle, and was long before the enactment of the Civil Rights Acts. Consequently, the Civil Rights Acts were adopted to supply a defect in the laws of the United States which did not exist in the English law.

And so, the Congress recognized that said defects should be supplied by enacting Section 49a, and, in the year 1948, had it renumbered 49a of Title 8, U. S. C., thus showing its intention that executors and administrators could not deprive beneficiaries of properties to which they were entitled, thus curing a defect in the law which was recognized by Chief Justice Mansfield in the Duchess of Kingston's case, 20 Howell's State Trials 412, when he gave an example of a void judgment:

> "Thus in the common case of executors, a creditor has a right to be paid out of the effects left by a dead person, who is debtor: the executor intending to cheat the creditor by an agreement with another person, who is no real creditor, prevails upon him to commence a suit, and suffers judgment to pass at the instance of such a friend; by which he is made the original creditor, and the executor, as representative, debtor to the person so suing by agreement. The real creditor cannot pursue any steps to undo the judgment: no, he says, by way of answer, that judgment is void against me; you two persons agreeing

and colluding together shall not turn the forms of law to my prejudice: * * *"

VI.

The language (Pro. 11), "But assuming that the state court proceedings were not within the jurisdiction of the courts which decided them * * * they were not void but, at most, erroneous" is a statement in direct conflict with the law as declared in the decisions of this Court, and all the other courts of appeals, and all the courts in the Anglo-Saxon world.

Said decision conflicts with the general law on the subject, well stated in *Manning* v. *Ketcham*, 58 F. 2d 945, where attention is given to the law as declared by this Court and the English courts on this question from the time of the case of the Marshalsea.

The decision of the Court of Appeals (Pro. 11) reflected in said language is in conflict with the decisions of this Court and all other courts holding that even in cases where a court has jurisdiction of the parties and the subject matter, yet if it is not within the power granted to it by the law of its organization, its decree is void. *Bigelow* v. *Forrest*, 9 Wall. 339; *Ex parte Lange*, 18 Wall. 163; *Windsor* v. *McVeigh*, 93 U. S. 274; *Gray* v. *Clement*, 286 Mo. 100, l. c. 109, S. C. 296 Mo. 497; *Charles* v. *White*, 214 Mo., l. c. 208; *Kansas City* v. *Mullins*, 209 S. W. 558; *O'Donoughue* v. *Boies*, 159 N. Y. 87, l. c. 98, 100; *National Bank of Topeka* v. *Mitchell*, 154 Kan. 276, 118 Pac. 2d 519; *Shelly* v. *Kramer*, 334 U. S. 1, 17.

The decision of the Supreme Court of Missouri in 345 Mo. 741-751 (R. 37-50, 692-701), is pleaded as *res judicata* settling the issues as to conflicting interests in this case in the second amended complaint in paragraph 45 (R. 25), which conflict rendered the judgments void.

VII.

The Court of Appeals erroneously affirmed the failure of the District Court to comply with the provisions of Rules 1 and 12 (b) (6) of the Rules of Civil Procedure, in that after said District Court had authorized the filing of matter and material outside the pleading for nearly two years—establishing petitioner's right to denial of respondents' motions for summary judgment—yet, without excluding same, the court dismissed the case on the theory that the complaint failed to state a cause of action.

Rule 12 (b) (6) was invoked by respondents who, with the consent of the district court, filed matter and material outside the pleading, which was not excluded by the district judge. The district court refused to pass upon respondents' motions for summary judgment (R. 78, 79-80, 81-82).

Said Rule 12 (b) (6) provides:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, * * *"

The district court also ignored Rule 1:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action"

in that, at the request of respondents (R. 78, 79-80, 81-82) the district court between April, 1948, and December 1, 1949 (83), permitted respondents to file matter and material incorporated in their 1,992 pages of supplemental printed record, and petitioner 787 pages of record and material in opposition, and then, after the truth of the

allegations of the complaint was established by said matter and material, the district court refused to rule on, and overrule, respondents motions for summary judgment.

The Court of Appeals for the second circuit in *Compania de Remorque y Salvamento* v. *Esperance, Inc.*, 187 F. 2d 114, l. c. 117, has ruled that said Rule 12 (b) (6) is mandatory and compels the district court and the Court of Appeals, in such case, to dispose thereof under the provisions of Rule 56.

See, also, *Butcher* v. *United Electric Coal Co.*, 174 F. 2d 1003 (C. A. 7). In short, a motion to dismiss is thereby converted into a motion for summary judgment. See Advisory Committee's Note to Rule 12 (b) as amended, *Kelly* v. *R. F. C.*, 172 F. 2d 865 (C. A. 1). The district court itself referred to this case as one pending on motion for summary judgment (R. 103).

In *Sibbach* v. *Wilson*, 312 U. S., l. c. 13, in construing one of said rules, this Court said:

> "In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, * * *"

And the Court further said that if said rule

> "* * * is within the authority granted, the federal legislature sanctioned it as controlling all district courts."

Rule 1 provides:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

The district court, in not excluding the matter and material outside the pleading—at the request of respondents—and in requiring the petitioner to incur the expense of securing and preparing and filing the material contained in the 787 pages of the printed record to counteract the matter and material contained in 1,992 pages of respondents' supplemental printed record, and then refusing to decide the questions raised, would seem to be a direct disobedience of said rule, which has the force of a statute. In the Sibbach case this Court points out, l. c. 14:

> "• • • that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."

It is singular that in this case, when the truth contemplated by the rule was establisheed, the district court refused to give any effect thereto, and the Court of Appeals erroneously approved its erroneous decision—which decision so approving was in direct conflict with the above decisions of the Courts of Appeals for the First, Second and Seventh Circuits, and in direct conflict with the command of Rule 1 and Rule 12 (b) (3) of the Rules of Civil Procedure promulgated by this Court for the guidance of the district courts—and the decision of this Court in *Sibbach* v. *Wilson*, 312 U. S. 1.

Said rule had even more potency than a lawfully enacted rule of the Court, the effect of which was stated in *Rio Grande Irrig. & C. Co.* v. *Gildersleeve*, 174 U. S. 603, and *Weil* v. *Neary*, 279 U. S. 160. In the Rio Grande case this Court said, l. c. 609-610:

> "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon the

parties to an action, and cannot be dispensed with to suit the circumstances of any particular case."

In the Weil case Chief Justice Taft, speaking for the Court, said, l. c. 169-170:

> "It is clear that a rule of court thus authorized and made has the force of law. *Rio Grande Irrig. & Colonization Co.* v. *Gildersleeve,* 174 U. S. 603, 608, 43 L. Ed. 1103, 1105, 19 Sup. Ct. Rep. 761; *Thompson* v. *Hatch,* 3 Pick. 512; *District of Columbia* v. *Roth,* 18 App., D. C. 547, 550; *Murphy* v. *Gould,* 39 App., D. C. 363, 367; *Wilkinson* v. *Walker* (D. C.), 292 Fed. 402; *State ex rel. Whitaker* v. *Langford,* 158 Ind. 34, 62 N. E. 624; *Advance Veneer & Lumber Co.* v. *Hornaday,* 49 Ind. App. 83, 86 N. E. 784."

VIII.

The Kansas Statute of Wills, authorizing a bachelor to make his will and preventing revocation thereof by his marriage and death without children, rendered the judgments awarding his widow one-half of his estate in Kansas void.

Section 22-201, R. S. Kan. 1923 and 1935, made the common law of England, as to the above point, the law of Kansas (*Shorten* v. *Judd,* 60 Kan. 75; *Vanek* v. *Vanek,* 104 Kan. 624). That law, as stated by Lord Ellenborough, is:

> "Marriage, indeed, and the having of children, where both those circumstances have occurred, has been deemed a presumptive revocation, but it has not been shown that either of them singly is sufficient. I remember a case some years ago of a sailor who made his will in favor of a woman with whom he cohabited, and afterwards went to the West Indies and married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every

shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation."

(*Doe a of White* v. *Barford*, 4 M. & S. Rep. 10, l. c. 12.)

Respondents' claim that as to his Kansas property John Moffett died intestate as to one-half thereof, and claim that Mrs. Weede is entitled thereto by the law of intestate succession.

The trouble with that contention is that the Roman Law as to intestate succession is in force in Kansas, as shown by the decision in *Riemann* v. *Riemann*, 124 Kan. 539, l. c. 542:

"While the jurisprudence of this state is greatly obligated to the common law, on this particular subject of adoption as well as *on the law of intestate succession* our lawmakers deliberately crossed over to the side of the civil law—an historical fact which gives a keynote to the general trend of decisions of this court throughout its entire history."

In Sohm's Institutes, 2d Ed., p. 482, it is said:

"In the free marriage of Roman law the principle of separate property was strictly applied. The property of both husband and wife remained unaffected by the marriage not only during their joint lives, but also after the death of either of them. According to the civil law a free marriage did not give rise to any mutual rights of succession as between husband and wife as such."

In Burdick's Principles of Roman Law and Their Relation to Modern Law, at page 572 it is said:

> "The 118th Novel made no provision for the succession of a husband to his wife or of a wife to her husband. Only those persons who were related by blood were included in this law."

The Supreme Court of that state holds that in such a case as this there is no revocation, as the will is valid in its entirety (*Vanek* v. *Vanek*, 104 Kan. 624; *Schippel* v. *Jennerson*, 169 Kan. 151) by virtue of the Kansas Statute of Wills.

Since said statute was before the Kansas courts, they were without jurisdiction to proceed contrary to the unquestionable and unquestioned letter of its provisions. *United States* v. *Walker*, 109 U. S. 258; *Clevinger* v. *Figley*, 68 Kan. l. c. 707—both of which cases cited *Bigelow* v. *Forrest*, 9 Wall. 339, and *Windsor* v. *McVeigh*, 93 U. S. 274; *Gray* v. *Clement*, 286 Mo. 100, l. c. 109.

In the Clevinger case the court stated:

> "In pronouncing the sentence the court has the statute before it, and is bound by the unquestioned and unquestionable letter of its provisions. It has no investigation to make or independent conclusion to form, and any transgression of the language of the law is inoperative and void."

In *Gray* v. *Clement* the court stated:

> "*Where the Constitution or statute absolutely prohibits a court from doing a particular thing then the order or judgment of the court made in violation thereof is absolutely void for want of jurisdiction* and may be assailed in a collateral proceeding." (Italics the Court's.)

An affirmance on appeal of a void judgment does not make it valid (*Revere* v. *Revere*, 133 Kan. 300, l. c. 302-303).

IX.

Commerce Trust Company became executor and administrator of the Moffett estates in consideration of its act in preparing John Moffett's will—an act made a misdemeanor by the Missouri statutes. All proceedings by it in said offices are therefore void.

The opinion (Pro. 3) states that Commerce Trust Company wrote the will of John Moffett through Mr. Howard, "as trust officer and attorney" for it. The complaint supplements that statement by the statement that it (R. 7) was in consideration of being nominated as alternative executor. In so writing said will, Commerce Trust Company violated the statute of the State of Missouri enacted in the year 1915 (Laws 1915, p. 99), or about 6 years before it wrote the will. That statute made the act of a corporation writing a will an act that comes within the definition of practicing law, and made the commission of such act a misdemeanor. Consequently, all of its acts after such appointment, having had a criminal inception, were void for that reason alone, under the rule stated by this Court in *Oscanyan* v. *Winchester R. Arms Co.*, 103 U. S. 261.

The supreme court of Missouri in *State ex inf. Miller* v. *St. Louis Union Trust Co.*, 335 Mo. 845 at l. c. 860 discussed and reproduced said statutes, and declared that writing wills in consideration of being named as executor was practicing law in violation of the law, and that l. c. 872:

> "• • • respondent henceforth cease and desist from the aforesaid illegal practices and conduct its business according to law on penalty of the forfeiture of its corporate charter and franchise."

X.

Sections 87 and 88, R. S. Mo. 1939, enacted in 1845, were mere legislative decrees, void under the due process provisions of the Vth and XIVth Amendments. Said Vth was still functioning, as to Missouri legislation, by virtue of Article III of the treaty with France of April 4, 1803.

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Sections 87 and 88 R. S. Mo. 1939, enacted in the year 1845 by the Missouri legislature, amount to a judicial decree depriving surviving partners of their own property without due process of law, in violation of the Vth Amendment made applicable by Article III of the Treaty with France of April 30, 1803 (R. 4-5), and also in violation of the XIVth Amendment adopted in 1868, in that the State of Missouri thereby enabled Commerce Trust Company to deprive the surviving partner, Thomas S. Moffett, of his property without due process of law and by a denial of the equal protection of the laws, in violation of Section 1 of the XIVth Amendment all contrary to the law, prohibiting administration on the estate of a living person.

That the Vth Amendment was made applicable by Article III of the Treaty with France results from the decisions of this Court. In *Balzac* v. *Porto Rico,* 258 U. S. 298, l. c. 309, it is said:

> "• • • a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union in *Rassmussen* v. *United States,* 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514."

Said article of the treaty is:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantagees and immunities of citizens of the United States, * * *"

It was made applicable to the Territory of Louisiana by its terms, and gave to the then and future inhabitants of said Territory the same rights as citizens of the United States and the protection of the United States Constitution.

And so, when said partnership administration statutes were enacted, they were still-born. And if anything could make them more so, it was the XIVth Amendment adopted 23 years thereafter.

So that said Sections 87 and 88 appear on their faces to be utterly void—and the order of the "special" probate judge appointing Commerce Trust Company to administer on the estate of Thomas S. Moffett—in so far as it consisted of his property in the assets of said partnership estates—was for that reason void, as stated in *Johnson* v. *Beazley*, 65 Mo. 250; *Scott* v. *McNeal*, 154 U. S. 34; *Griffith* v. *Frazier*, 8 Cranch. 9; *Rose* v. *Himely*, 4 Cranch. 421. Said authorities hold that administration on the estate of a living person is void.

Missouri itself, recognizing the invalidity of said partnership administration statutes, has repealed same (Session Laws Missouri 1949, p. 506). At l. c. 521, Section 44 reads:

> "All acts or parts of acts inconsistent with this act are hereby repealed."

Justice Catron, discussing said third article of the Treaty in the Dred Scott case, 19 How. 393-633, and its application to the contemplated future population, said:

> "And for this contemplated future population, the Treaty as expressly provided as it did for the inhabitants residing in the Province when the Treaty was made. * * * This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the Treaty."

As recently as the year 1892 this Court in *Boyd* v. *Nebraska,* 143 U. S. 135, quoted and gave effect to Article III of the Treaty with France, citing Justice Catron's opinion in the Dred Scott case, holding that a person who, long after the execution of the Treaty became an inhabitant of the Louisiana Purchase, in which the State of Nebraska is included, was protected by said Article in his rights as a citizen of the United States. So that, it is apparent that those statesmen who made said Treaty contemplated and intended that, by force thereof alone, all future inhabitants of said Louisiana Purchase would be protected by said Article III of the Treaty.

George Gordon's Apostrophes to Napoleon include no mention of his foresight as to the future inhabitants of the Louisiana Purchase. But one apostrophe applied by him could well be applied to the evil genius of Commerce Trust Company.

That apostrophe is:

> "He who of old would rend the oak,
> Dreamed not of the rebound:
> Chained by the trunk he vainly broke—
> Alone—how looked he round?
> Thou, in the sternness of thy strength,
> An equal deed hast done at length,
> And darker fate hast found!"

XI.

Under the allegations of the complaint and the law applicable thereto, the exercise of the sound discretion embodied in Rule 38 of this Court necessitates the granting of the writ prayed for.

The exercise of the sound judicial discretion embodied in Rule 38 of this Court compels and necessitates the granting of the writ prayed. This for the reason that it is the indispensable duty of this Court to grant said writ in this case under the facts and authorities referred to in this petition. For paragraph 5 of Rule 38 is peculiarly applicable to the facts herein. Those facts measure up to the conditions of said paragraph.

In *Osborn* v. *Bank,* 9 Wheat. 738, Chief Justice Marshall well states the law as to Rule 38 at l. c. 866:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law."

The law applicable to said facts under Rule 38 has been well stated in *State* v. *Wood,* 23 N. J. L. 560, 564:

> "If the court below were bound to grant the writ of certiorari in the present case; if the law required that it should be done, and there was error in law in not doing it, clearly there was no room for the exercise of discretion. The writ, then, was of right, not of grace."

The facts which its own Rule 38 governs, and which this Court must consider in determining whether or not to grant certiorari, appear in the record in this case. For it appears that the decision of the Court of Appeals is in conflict with many decisions of other Courts of Appeals on the same matter, and in conflict with the decisions of the Supreme Court of Missouri on questions of local law applicable herein. And with the decisions of the Supreme Court of Kansas likewise applicable. And with the decisions of this Court likewise applicable, and there is no extrinsic reason in existence justifying denial of the writ.

So that the law, as embodied in said Rule 38, requires that this Court grant the writ, and that it would be error in law not to do so. For, under these facts and the applicable law, clearly there is no room for the exercise of discretion.

And so herein the writ is a writ of right, and not of grace.

The provision of Rule 38, paragraph 5, that

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor"

is a contradictory provision: (1) because whenever the facts in any case presented to this Court authorize this Court in the exercise of sound judicial discretion to grant a writ of certiorari, then such is a case wherein the facts under the applicable law make the granting of such writ a matter of right, and not of grace. For, if sound judicial discretion requires this Court to grant the writ, it could not refuse it without violating the law of its creation. (2) The statement that "and will be granted only where

there are special and important reasons therefor" is wholly superfluous, for the reason that it must be granted whenever this Court, in the exercise of a sound judicial discretion, is compelled, by the law applicable to said facts, to issue the writ, then it must be granted if the Court is to do its indispensable duty. And it cannot refuse to perform same by its rule declaring that it is not a matter of right, and that it will be granted only where there are special and important reasons therefor, which reasons are not defined or embodied in the rule itself and are wholly speculative and unknown.

XII.

Since the jurisdiction of this Court is vested by the Constitution, and not by any Act of Congress, this Court is without jurisdiction to refuse the performance of its constitutional duty by the exercise of its own discretion.

Certiorari in this case is a writ of right.

The opinions of the seven judges in *United States* v. *Baldi,* 96 F. Supp. 100, declining to decide whether a refusal of this Court to grant certiorari imports a decision on any issue or not; that of Chief Judge Learned Hand in *Schechtman* v. *Foster* (C. A. 2), 172 F. (2d) 339, holding such denial conclusive, and those of this Court in *Darr* v. *Burford,* 339 U. S. 200, as to whether or not this Court, in denying a petition for certiorari, decides anything which it had jurisdiction to decide, has suggested the above compelling reason for granting the writ to petitioner.

That certiorari is a writ of right as to this case is sustained by the following provisions of the Constitution: The first sentence of Article III thereof that

> "The judicial power of the United States shall be vested in one Supreme Court, * * *"

and those inferior courts established by Congress.

Said first sentence and the first clause of Section 2 of Article III providing that

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties * * *"

and of the last sentence of paragraph 2 of said Section 2 of Article III providing

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make"

excludes discretionary power on the part of this Court to refuse to take jurisdiction of this case.

This Court in *Dorr* v. *United States,* 195 U. S. 138, as to the provisions of the Constitution in Article IV, Section 3, granting Congress power to make "regulations" for Territories, held, l. c. 146:

> "Regulations in this sense must mean laws, for, as well as states, territories must be governed by laws."

Therefore, no regulations of the appellate jurisdiction of this Court can be made by any authority other than the Congress. For the regulations which the Congress is thus authorized to make are included in its legislative power, of which, through Chief Justice Hughes in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, l. c. 421, this Court said:

> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, Sec. 1. And

the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. 1, Sec. 8, Par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."

In *Durousseau* v. *United States*, 6 Cranch. 307, l. c. 313-314, in discussing the last sentence of Clause 2 of Section 2 of Article III, Chief Justice Marshall said:

> "It is contended that the words of the Constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by Congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.
>
> The force of this argument is perceived and admitted. Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the Constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the Constitution."

The first sentence of paragraph 5 of Rule 38 conflicts with the above quoted language of the Chief Justice and the provisions of Article III of the Constitution. Said sentence provides:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Congress was denied authority by the Constitution, with reference to this Court, to do otherwise than

> "To make all laws which shall be necessary and proper for *carrying into execution*"

the judicial powers vested in this Court by the Constitution.

As pointed out by Chief Justice Hughes in *Panama Refining Co.* v. *Ryan, supra:*

> "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."

And so Congress could not transfer to this Court any discretion to decline to exercise the jurisdiction vested in it by the Constitution.

In *Wayman* v. *Southard,* 10 Wheat. 1, Chief Justice Marshall said, l. c. 43-44:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts, respectively, to regulate their practice. It certainly will not be contended that this might not be done by Congress."

The power given by statute to this Court to regulate its practice is, of course, appropriate, for otherwise it could not very well function.

But Congress could not give it power, discretionary or otherwise, to divest itself of the appellate jurisdiction vested in it by the Constitution. Congress could not give it power to refuse to exercise jurisdiction of 85 per cent of the cases lawfully brought here for review, as provided by Section 2106, Title 28, U. S. C., or refuse to exercise the appellate jurisdiction vested in this Court by the express language of the Constitution commanding that

> "* * * the Supreme Court shall have appellate jurisdiction, * * * with such exceptions and under such regulations as the Congress shall make." (Article III, Section 2, Par. 2.)

Said language confines the power to enact laws making exceptions to Congress only, in accordance with the rule that the exception from a power marks its extent.

Since appellate jurisdiction has been conferred on this Court by the Constitution, from which Congress has not excepted this case, and since Congress has acted in obedience to the provision that

> "The Supreme Court shall have appellate jurisdiction * * * under such regulations as the Congress shall make"

by enacting Sections 1254, 2101 and 2106, Title 28, U. S. C., it necessarily follows that said command of the Constitution compels the granting of the writ.

Section 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such

> further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

If Sections 1254, 2101 and 2106, R. S. U. S., have the same meaning as Section 240 (a), adopted in 1925, then they constitute an unlawful delegation of legislative power by Congress to this Court, which could not be delegated by the use of the words "to require by certiorari," and upon the theory that certiorari was a discretionary writ and therefore gave this Court power to make its Rule 38 providing that the question as to whether or not this Court would exercise its jurisdiction to review this case. For said language

> "to require by certiorari * * * that the case be certified to the Supreme Court for determination."

is equivalent to a law purporting to authorize this Court to be governed in all its acts by its own discretion whenever its appellate jurisdiction is involved.

Neither Constitution nor Act of Congress has authorized this Court to refuse jurisdiction of this case, either by, with, or without, the exercise of "sound judicial discretion." But, on the contrary, both the Constitution and Act of Congress placed this case within the appellate jurisdiction of this Court. Congress could not enact any law authorizing this Court to exercise its discretion to refuse to exercise its jurisdiction, or to refuse to perform its indispensable duty.

Justice Story calls attention to the imperative, impersonal, all-embracing language of the constitutional provisions vesting the judicial power of the United States, and emphasizes the exception referred to in the Constitution which Congress could make to the exercise of the appellate jurisdiction of this Court in *Martin* v. *Hunter's Lessee*, 1 Wheat., at l. c. 332-333, where he said:

"The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words 'may have' appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interest might, from time to time, require.

Other clauses in the Constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the Constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution."

Sections 1254 and 2106, Title 28, U. S. C., show that the Congress intended and contemplated that the judicial power shall extend to all the cases enumerated in the Constitution which have been decided by courts of appeals.

Since the Constitution and laws enacted by Congress pursuant thereto shall be the supreme law of the land, there is no room for the exercise by this Court of its

discretion to deprive itself of that jurisdiction which is vested in it by said supreme law (Article VI, par. 2).

There are expressions in opinions of this Court to the effect that there is no constitutional obligation resting on this Court to exercise the appellate jurisdiction thus vested in it by the Constitution, but that the question is wholly a matter of the Court's discretion. (See *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, l. c. 918; *Darr* v. *Burford,* 339 U. S. 200-238, l. c. 223, 227-228.)

In *Darr* v. *Burford,* 339 U. S., l. c. 227-228, it is said:

> "To attach significance to a denial of a certiorari petition regarding the merits of the issues raised by the petition would be to transform a mechanism for keeping cases out of this Court into a means of bringing them in. It would contradict all that led to the adoption of certiorari jurisdiction and would reject the whole course of the Court's treatment of such petitions, both in practice and profession. For if denial does import an expression of opinion upon the merits of the case, then we must deal with the merits of the case."

Judge Learned Hand, with the concurrencee of his entire court, in *Schechtman* v. *Foster* (C. A. 2), 172 F. 2d 339, is recognized by Note 1 at page 228 of *Darr* v. *Burford, supra,* as having given to "* * * such denial conclusive effect on the merits." So has the report of the opinion in *Darr* v. *Burford, supra.* But it seems that it has often been held that the denial adjudges nothing. In *Carter* v. *St. A. B. R. Co.,* 338 U. S. 430, l. c. 438, it is said:

> "Where a case involves no general principle requiring pronouncement but merely its own unique circumstances, such alleviation is inconsistent with the criteria, set forth in Rule 38, governing this Court's discretion in granting a writ of certiorari."

Thus asserting that the nonexisting discretion as to whether or not it will exercise the appellate jurisdiction of this Court is governed by Rule 38 instead of by the Constitution and an Act of Congress.

Its Rule 38 amounts to legislation by this Court with reference to a subject matter concerning which only the Congress has power to legislate. For no court of the United States has any power to intrude upon the domain of Congress, and to, in effect, enact legislation, the duty of enacting which is confined by the Constitution to Congress alone.

The Constitution imposes upon this Court the duty to exercise the jurisdiction vested in it by the Constitution, whether original or appellate. And when that judicial power, under the constitutional command, extends to any case, then it is the duty of this Court to exercise its judicial power under the law well stated in *Cohens* v. *Virginia*, 6 Wheat. 265, l. c. 404, by the Chief Justice:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United

States. We find no exception to this grant, and we cannot insert one."

The idea that a fundamental law provides absolutely for the performance of a duty by any government officer or officers, or any department of the government, and that such officer or officers, or such department of the government, could exercise discretion as to whether or not it should perform its constitutional duties, is preposterous. For, if it can exercise its discretion as to whether or not it will do its duty, then it has no duty to perform, and the constitutional provision might as well be stricken from the Constitution. This Court has never consciously approved unconstitutional practices.

As instance the opinion of Chief Justice White in *Ex parte United States,* 242 U. S. 27-53, wherein it appeared that a practice in conflict with the provisions of the Constitution had been followed by the judges of United States courts, including some justices of this Court when sitting in lower courts, l. c. 51-52:

> "Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. • • • But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the last, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future."

Another is *Swift* v. *Tyson,* 16 Pet. 1, decided in the year

1842, overruled in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64-92, where Justice Brandeis said, l. c. 79:

> "Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' "

And so, the practice of substituting the discretion of this Court for the provisions of the Constitution and the Acts of Congress made pursuant thereto by declining to exercise the jurisdiction vested in this Court whenever it pleases is an unconstitutional assumption of power by this Court, necessitating its treatment as one.

> "• • • which no lapse of time or respectable array of opinion should make us hesitate to correct."

The power of a court to make law and justice of a brand to suit its ideas would not be above the just claim of a final judicature if it were not a condition precedent to the exercise of such power and the rendition of such justice that the leading principle on which it must be based would be its own discretion.

Attention is respectfully called to the history of the world and to the lessons which, in this respect, must be deduced therefrom to the effect that whenever the life, liberty or property of any human being was dependent for its preservation on the discretion of any man or tribunal, the direct consequence was that the first franchise and first right of that human being and, incidentally, all those which thereon vitally depend, is to be vitiated for some cause of which no man knows, and is to be proved by no known rule whatsoever of legal evidence.

This is so anomalous, not alone to our whole Constitu-

tion, but to the civilization which has been evolved by the English-speaking race, that it is apparent that the most trivial right which the citizen claims never was or can be vitiated in such manner.

That a court could properly decide by such rule could be supported only by the following method of reasoning: A court of last resort does not make laws. No, such power is not contended for; it only declares law and, as it is a tribunal both competent and supreme, what it declares to be law becomes law, though it was never law before.

Then the circumstance that there is no appeal from its decision is made to imply that it is unnecessary to follow any rule or constitutional mandate in its exercise.

The judgment does not derive its validity from conformity to the law, but preposterously, the law is made to attend on the judgment, and the rule of the judgment is no other than the arbitrary and occasional will of the individuals constituting the court. An arbitrary discretion leads, legality follows, which is just the very nature of a legislative and, hence, an illegal act.

The idea dominating the character of discretion herein referred to is that which in remote and barbarous ages resulted in the denial of human rights and the annihilation of human freedom. It is the species anathematized in the quaint and pointed phrase of Coke when he denounced the determination of legal questions by "the crooked cord of the discretion of the judges," and not in accordance with the "golden 'metawand' of the law" further illustrated by his statement in Part Two Coke's Institutes, page 56:

> "*recta linea est index sui, et obliqui,* hereby the crooked cord of that, which is called discretion, appeareth to be unlawful, unless you take it, as it ought to be, *discretio est discernere per legem, quid sit justum.*"

Both Coke and Camden condemned the exercise of that discretion referred to by Camden in the Court of Common Pleas in the trial of Hindson and Kersey when he said:

> "The discretion of a judge is the law of tyrants. It is always unknown. It is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice. In the worst it is every vice, folly and passion to which human nature is liable."

In *Cohens* v. *Virginia*, 6 Wheat. 264, in connection with contentions made as to its appellate jurisdiction created by the Constitution, this Court said, l. c. 377:

> "If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department."

It is therefore respectfully submitted that the Court grant petitioner's petition for certiorari, reversing the judgment of the Court of Appeals and, under the authority conferred on it by Section 2106, Title 28, U. S. C., end this ancient and devastating litigation by itself directing the District Court to overrule respondents' motions for summary judgment, and to render a judgment finding that petitioner is entitled to recover from the respondents, and to empanel a jury to ascertain the amount of petitioner's damage.

MARTIN J. O'DONNELL,
Attorney for Petitioner.

FILED
JUL 3 1951
CHARLES ELMORE CROP

Supreme Court of the United States

No. 75.

LOUISE McGREW MOFFETT AS AN INDIVIDUAL AND EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED, PETITIONER,

VS.

COMMERCE TRUST COMPANY, A CORPORATION; HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, RESPONDENTS.

BRIEF OF RESPONDENTS, B. C. HOWARD AND WILLIAM H. KOPP, IN OPPOSITION TO PETITION FOR CERTIORARI.

B. C. HOWARD,
WILLIAM DENNIS BUSH,
Attorneys for Respondents, B. C. Howard and William H. Kopp.

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EXPLANATION.

Figures in parentheses: (_____), (W ____) and (C ____) refer respectively to pages of (1) Petitioner's Record, (2) Supplemental Record of respondents Helen Weede and Orlin A. Weede, and (3) Supplemental Record of Respondent Commerce Trust Company.

STATEMENT.

Petitioner in her petition filed herein refers to and makes her second amended complaint a part thereof, and alleges facts which are so arranged as to make them cloudy and uncertain and which makes it necessary for us to state them in an orderly way so the Court may have a better understanding of the issues involved in this certiorari proceedings.

I.

Missouri Probate Court Proceedings.

On February 21, 1921, John Moffett executed his last Will and Testament and therein named his brother, Thomas S. Moffett, Executor; and further provided (W-91) that in case of the death, inability or refusal of his brother to act, then and in that event, Commerce Trust Company, a corporation of Kansas City, Missouri, should become Executor.

On February 22, 1921, John Moffett married Helen Mustard (now Helen Weede) (R-7), and died on the 23rd day of August, 1927 (R-8).

On August 29, 1927, the Probate Court of Jackson County, Missouri, pursuant to the terms of the will, appointed Thomas S. Moffett Executor of the Estate of John Moffett, deceased (R-8), without bond. Following which, Thomas S. Moffett assumed the administration of the Estate of John Moffett, deceased.

At the time of the death of John Moffett he was a member of a partnership known as Moffett Brothers, which consisted of John Moffett and Thomas S. Moffett; of Moffett Brothers and Andrews, which consisted of John Moffett, Thomas S. Moffett and L. B. Andrews; and of Moffett

Brothers Cattle, Land and Lumber Company, which consisted of John Moffett, Thomas S. Moffett, Joseph W. Moffett and Renwick J. Moffett. Thomas S. Moffett was also a member of the partnership known as Andrews, Lewis and Moffett. The other members of said partnership were L. B. Andrews and J. C. Lewis (R-7). The business transactions between the individual members of said partnerships and the partnerships themselves were recorded in books known as the journal and ledger of Moffett Brothers & Andrews (R-7).

Thomas S. Moffett, as surviving partner of Moffett Brothers and Moffett Brothers & Andrews, failed to exercise his right to administer upon the estate of said partnerships by giving bond and submitting himself to the jurisdiction of the Probate Court as provided by *Section 80,* Revised Statutes of Missouri, 1919, but assumed the administration of said partnerships under the common law.

On account of the failure of Thomas S. Moffett as Executor of the Estate of John Moffett to perform his duties as required by law and on account of conflict of interests between Thomas S. Moffett, individually, and the estate of John Moffett and the partnership estates in which John Moffett was interested, Helen Moffett (now Weede), the widow of John Moffett filed in the Probate Court of Jackson County, Missouri, application for the removal of Thomas S. Moffett as Executor of the Estate of John Moffett. On November 7, 1928, the Probate Court, acting through a special judge, sustained said application and entered an order revoking Letters Testamentary which had been issued to Thomas S. Moffett.

On November 28, 1928, the probate court, through a special judge, pursuant to the terms of the will of John Moffett, issued Letters Testamentary (*de bonis non*) to the

Commerce Trust Company on the estate of John Moffett, deceased; upon which date the Commerce Trust Company assumed the administration of said estate and since that date has been acting as executor thereof.

Under Section 85, Revised Statutes of Missouri, 1919, it is provided that in the case a surviving partner shall neglect or refuse to give bond as required within thirty days after the granting of Letters Testamentary on the estate of the deceased partner, the Executor or Administrator for the deceased partner shall give additional bond and administer upon the partnership assets.

Additional bond was filed by the Commerce Trust Company and was approved by the court; and Commerce Trust Company, as Executor of John Moffett, deceased, was ordered to take charge of the assets of the partnership estates of Moffett Brothers and Moffett Brothers and Andrews.

Under the provisions of Section 90, Revised Statutes of Missouri, 1919, it is provided that the surviving partner and creditors of a partnership, taken charge of by the executor or the administrator of the deceased partner, may appear in court and defend against the recovery of any claim presented against such partnership or against the effects of such partnership; and further provides for an appeal from any judgment of the Probate Court. Under the provisions of this section the surviving partner or creditor have a right to protect their interests against demands of any and all claimants to said partnership assets or any part thereof.

Under the provisions of Section 91, Revised Statutes of Missouri, 1919, the administration upon the partnership assets, whether by the surviving partner or executor of the deceased partner, shall in all respects conform to the ad-

ministration in ordinary cases, except where otherwise provided.

Under the provisions of *Section 202*, Revised Statutes of Missouri, 1919, relating to general administration, it is provided that any executor or administrator may establish a demand against his Testator or Intestate by proceeding against his co-executor or co-administrator in the manner prescribed for other persons, and further provides that if there be no co-executor or co-administrator, he shall file his claim and other papers and the court shall appoint some suitable person to appear and manage the defense. It will therefore be seen that the Missouri law provides that not only the surviving partner has a right to defend the partnership estate but the law also provides that the court shall appoint suitable persons to defend the estate against all such claims.

The above mentioned sections of the Missouri statutes appear in full in Item 2 of Respondent Commerce Trust Company's Appendix (pp. 5-9) where they are quoted as they appear in Revised Statutes of Missouri, 1939.

Under the law above referred to, the protection of a partnership estate is amply provided for, which would seem to indicate that the cases referred to on page 5 of the petition are not applicable and should not be taken into consideration in the administration of partnership estates.

II.

Book Accounts.

Petitioner, in her second amended complaint filed in the District Court (R-7), alleges that the books of said partnerships were kept in a common office in Kansas City, Missouri, where they (the interested parties) attempted to keep books concerning the business of said partnerships

and individuals. The books kept in the common office in Kansas City, Missouri, showed the amount due from Moffett Brothers to John Moffett; the amount due from Moffett Brothers and Andrews to John Moffett; the amount due from Moffett Brothers & Andrews to Moffett Brothers; and the amount due from Andrews, Lewis & Moffett to Moffett Brothers & Andrews; and the amount due from Moffett Brothers Cattle, Land & Lumber Company to Moffett Brothers; and the amount due from Thomas S. Moffett to Moffett Brothers; and the books of Moffett Brothers & Andrews Commission Company, which were also kept in said common office, showed that Thomas S. Moffett was indebted to said Company.

The suits referred to by Petitioner on Page 6 of her petition as "some 14 groundless actions," (R-9-14), were all based on the book records which were kept in the Moffett office and it was the duty of the administrator of the John Moffett Estate, as well as the administrator of the partnership estates, to collect the amounts due and, if necessary, to institute legal proceedings for the collection of same.

III.

Kansas Litigation.

District Court Harper County, Kansas No. 7374. Moffett v. Moffett, 131 Kan. 582.

On August 15, 1929 (R-18, Para. 34), Thomas S. Moffett, the predecessor-in-interest of Petitioner, filed in the District Court of Harper County, Kansas, a partition suit wherein he sought a partition of the Moffett Brothers assets in Kansas without an accounting or an adjustment of the rights and liabilities of all parties interested therein.

Before and after the filing of the suit in Harper County, Kansas, Respondent Howard, as attorney for the

Commerce Trust Company, earnestly endeavored to induce the parties interested to compromise and settle their differences and avoid unnecessary delay and expense which would be the result of litigation. As a result of his efforts negotiations were carried on to the extent that an oral accord was reached and an instrument of compromise and adjustment was prepared for signature but Thomas S. Moffett thereafter refused to execute same. After which, Respondent Howard told Mr. Watson (Mr. Moffett's attorney) and others interested that, unless the parties reached some agreement, it would be necessary for the Commerce Trust Company in its respective capacities to intervene in the Harper County District Court, where all the parties had entered their appearance, and ask that court to order an accounting so these differences could be judicially determined between the parties interested.

The facts above referred to are partially set forth in Exhibit 44, R-651, which shows only segregated parts of the testimony given by Respondent Howard in what is known as the Howard Fee Case. The full record of this testimony of Respondent Howard is shown in Commerce Trust Company's supplemental record, pages 806-858. The reading of the transcript of testimony above referred to (Especially C-819-20) will clarify many questions concerning which the record (R-651), offered by petitioner, is incomplete. These pages also show the full testimony of Respondent Howard concerning the Commerce Trust Company's Exhibit 8. We urge the court to read this testimony.

After the failure of Respondent Howard to secure a settlement he, on behalf of the Commerce Trust Company as Executor *de bonis non* of the Estate of John Moffett, deceased, and as administrator of Moffett Brothers Part-

nership Estate, asked permission to intervene in the Kansas partition suit for the purpose of securing an accounting before distribution of the partnership assets.

This application to intervene was opposed by Thomas S. Moffett and after the permission was granted an appeal was taken by him to the Supreme Court of Kansas, 131 Kan. 582.

In its opinion sustaining the lower court the Supreme Court of Kansas said, l. c. 588:

> "Appellant contends that the action is not brought in the proper forum for an accounting. But the plaintiff chose this forum and is in no position to complain on that ground. Appellant contends that a proper accounting, such as asked for by appellees, would require the consideration of property situated in other states—Missouri and Oklahoma. But it is a principle of law, applicable to courts of equity, that such a court, having assumed jurisdiction of the subject matter, will reach out and draw into its consideration and its determination the entire subject matter, and bring before it all the parties interested therein, in order that a complete and effectual final decree, adjusting the rights of all parties, may be entered and enforced (*Hazen* v. *Webb*, 65 Kan. 38, 68 Pac. 1096; *Appel* v. *Smith*, 105 Kan. 732, 185 Pac. 903; the same case on rehearing, 106 Kan. 717, 190 Pac. 8).
>
> It is unnecessary to say much about the applications to intervene. It is clear from the allegations in these applications and from the answer of Helen Moffett, which are taken as true for the purpose of this appeal, that it will be necessary, to a substantial extent, for the trial court to treat the real property of the partnership as personalty, and to whatever extent that is necessary to be done the intervener, in its respective capacities, is a proper party to the action. Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict.

But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties.

On the whole it seems quite clear that there should be such an accounting as is prayed for by the defendant and intervener in order to determine the respective interests of the parties in the land sought to be partitioned."

On July 24, 1930, the Commerce Trust Company, on behalf of the John Moffett Estate and the Moffett Brothers Partnership Estate, filed intervening petitions in the district court and prayed for an accounting.

On June 15, 1931 (R-19, Para. 35), the ancillary administrator of the John Moffett Estate in Kansas (R. O. Robbins) also intervened in said partition suit and prayed for an accounting.

IV.

Harper County, Kansas No. 7374.

Revised in name of Grace Torrance Clark, Admx. Clark v. Moffett et al., 136 Kan. 711.

On December 22, 1930, (R-20) Thomas S. Moffett died and on February 14, 1931, the cause was revived in the name of Grace Torrance Clark, Administratrix with the will annexed, of the Estate of Thomas S. Moffett, deceased, and Louise McGrew Moffett, sole beneficiary of Thomas S. Moffett, deceased.

On January 13, 1932, the district court of Harper County, Kansas, the forum which Thomas S. Moffett chose during his lifetime, rendered judgment in the partition-accounting suit No. 7374 in favor of R. O. Robbins, ancillary administrator of the Estate of John Moffett, against the Moffett Brothers partnership in the sum of $143,829.96

(R-20); also a judgment in favor of Commerce Trust Co., Executor *de bonis non* of the Estate of John Moffett, against Thomas S. Moffett Estate in the sum of $27,399.25 (R-127), as well as judgment in favor of the Commerce Trust Company as administrator of Moffett Brothers against the Moffett Brothers Cattle, Land and Lumber Co., in the sum of $101,228.06 (R-21).

Grace Torrance Clark as ancillary administratrix and Louise McGrew Moffett the sole beneficiary of T. S. Moffett appealed from the above mentioned judgment and decree to the Supreme Court of Kansas (R-21, Para. 39).

The Supreme Court in its opinion sustained the district court in its findings and judgments, 136 Kan. 711, and said, l. c. 714,

> "This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs. Notwithstanding the extraordinary and wholly unnecessary bulk of the matter presented, we have endeavored to go through it carefully and painstakingly and have done so as fully as our time would permit, and will treat and dispose of all the questions presented that have any semblance of merit. * * *
>
> * * * * * * *
>
> l. c. 723, Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit * * *. l. c. 724, The third item is the

one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least is the only one which properly could have been reached from the evidence."

The plaintiffs in the above case then filed, in the Supreme Court of the United States, a petition for certiorari, which petition was denied (290 U. S. 642).

V.

Federal Court Litigation in Kansas.

Louise McGrew Moffett v. R. O. Robbins, Adm'sr.
District Court 14 Fed. Supp. 602,
Court of Appeals 81 F. 2d 431.

A suit was instituted in the United States District Court for Kansas by Louise McGrew Moffett, executrix of the estate of Thomas S. Moffett, deceased, against R. O. Robbins, administrator with the will annexed of the estate of John Moffett, deceased, to enjoin the enforcement of the judgment rendered in the above entitled accounting-partition suit in the district court of Harper County, Kansas, No. 7374. This suit was dismissed by Judge Hopkins on September 4, 1935, 14 Fed. Supp. 602. In dismissing this case Judge Hopkins said, l. c. 604,

"Decisions of state courts of competent jurisdiction are binding and conclusive on all other courts of concurrent power and are not reviewable by federal district courts of concurrent and equal competent jurisdiction. The federal district courts have no appellate jurisdiction over the decisions of state courts. Such decisions of state courts ordinarily cannot be collaterally attacked, except for fraud. Fraud which entitles a party to impeach the judgment of another court of competent jurisdiction, where jurisdiction has been acquired over the parties, as in the suit complained of, must be extrinsic to the matter tried in the other suit and not there in issue. *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. And fraud cannot be alleged by general allegations but the facts must be stated. See Simpkins Federal Practice (Rev. Ed., 1934), par. 533, p. 507. The rule is well established that when a party has a defense which he could have interposed and was not prevented from doing so by accident, fraud, or mistake, he cannot reserve that defense to some other time or forum and thus develop a multiplicity of suits and prolong litigation. *Luikart* v. *Farmers' Lumber Co.*, 38 F. 2d 588 (C. C. A. 10); *Smith* v. *Apple*, 6 F. 2d 559 (C. C. A. 8); *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719.

An allegation in a bill that a judgment is not supported by evidence is a mere conclusion. That a judgment is based upon evidence supporting it must be conclusively presumed in suit to enjoin enforcement thereof." *Harrington* v. *Denny et al.*, (D. C.) 3 F. Supp. 584.

Petitioners appealed from the judgment of the United States District Court to the United States Court of Appeals, 10th Circuit, which court sustained the action of the district court in dismissing the petition, 81 F. 2d 431. In sustaining the lower court Judge Bratton said, l. c. 437 (C-46):

"[13] The judgment is assailed on the further ground that there was no adversary trial. Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark, as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett, Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Torrance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. In these circumstances, the mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves.

[14] The contention that the judgment was not supported by evidence needs little discussion. Such a question can be determined only on appeal. It cannot be decided in an equitable action to enjoin enforcement of the judgment. *Harrington* v. *Denny*, (D. C.) 3 F. Supp. 584; *Harris* v. *Bigley*, 136 Iowa 307, 111 N. W. 432; *A. B. Smith Co.* v. *Bank of Holmes County*, (Miss.) 18 So. 847; *Nashville, C. & St. L. Ry. Co.* v. *Mattingly*, 101 Ky. 219, 40 S. W. 673; *Burke* v. *Wheat*, 22 Kan. 722; *Martin* v. *Pifer*, 96 Ind. 245.

Other questions are argued, but we think they are insubstantial. For the reasons indicated, the order of dismissal is affirmed."

Plaintiffs therein then filed a petition for certiorari in the Supreme Court of the United States which was denied, 298 U. S. 675.

VI.

Howard Fee Case.

In re Moffett Brothers Partnership Estate, 345 Mo. 741, 137 S. W. 2d 507.

Respondent Howard filed in the Probate Court of Jackson County, Missouri, an application for allowance of attorney's fees. The Probate Court allowed additional fees and approved a payment which had been previously made by the Commerce Trust Company as administrator of the Moffett Brothers partnership estate.

Petitioners appealed this allowance and approval to the Circuit Court which also made an increased additional allowance for attorney's fees and approved the payment which had been previously made.

From the judgment of the Circuit Court, petitioners appealed to the Supreme Court of Missouri, 345 Mo. 741, 137 S. W. 2d 507. The Supreme Court of Missouri disallowed the additional fees but approved the fees that had previously been paid, in doing so the Supreme Court of Missouri specifically stated, l. c. 508:

> "The record covers nearly 1,400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, but the conclusion we have reached makes it unnecessary to consider but one of these grounds, viz., that, under the facts, claimant is not entitled to any fee from the Moffett Brothers estate.
>
> It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, but, as stated, we shall consider only one question."

From this it will be seen that the Supreme Court of Missouri did not pass upon the validity of the judgment

of any court which had previously passed upon any questions involved in the administration of the Moffett affairs.

VII.

Missouri Conspiracy and Damage Suit.

Moffett v. Commerce Trust Co., 354 Mo. 1098, 193 S. W. 2d 588.

Following the decision of the Supreme Court of Missouri as above recited, petitioners brought suit in the Circuit Court of Jackson County, Missouri, for conspiracy and damages against the respondents in this cause. This case was dismissed by the Circuit Court of Jackson County, Missouri, on motion of defendants. After which, petitioners took an appeal to the Supreme Court of Missouri which sustained the action of the trial court in its dismissal of the conspiracy suit, 354 Mo. 1098, 193 S. W. 2d 588. At page 592 (S. W.) the court said,

> "*In re Moffett Bros. Partnership Estate,* 345 Mo. 741, 137 S. W. 2d 507, grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as administrator of the partnership estate. Mrs. Moffett, individually and as executor of her husband's estate, resisted the allowance in the probate, circuit and supreme courts. No point was presented or decided as to Mrs. Moffett's right to appear in both capacities. The only point decided was that Howard was not entitled to an additional fee. 345 Mo. l. c. 745, 137 S. W. 2d l. c. 508. * * *
>
> Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803 and the 'due process' and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appel-

lants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. *Moffett* v. *Moffett*, 131 Kan. 582, 292 Pac. 947, 77 A. L. R. 294; *Clark* v. *Andrews*, 136 Kan. 23, 12 Pac. 2d 294; *Clark* v. *Moffett*, 136 Kan. 711, 18 Pac. 2d 555; *Id.*, 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; *Moffett* v. *Robbins*, D. C., 14 F. Supp. 602; *Moffett* v. *Robbins*, (10 Cir.) 81 F. 2d 431; *Id.*, 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397. Appellants have not been denied due process. They have not only had their day in court, but their months and years."

Petitioners appealed to this court and this court dismissed the appeal because there were no Federal questions involved (329 U. S. 669).

VIII.

Federal Conspiracy and Damage Suit.

Moffett v. Commerce Trust Co.,
District Court 87 Fed. Supp. 438,
Court of Appeals 187 F. 2d 342.

Following the dismissal by this court, of the appeal in the above entitled cause petitioners filed their conspiracy and damage suit in the United States District Court for the Western District of Missouri, making practically the same allegations therein, as that made in the Missouri Court and the United States District Court dismissed this case, 87 Fed. Supp. 438.

From the order dismissing the suit, petitioners appealed to the United States Court of Appeals, 8th Circuit, which affirmed the judgment of the district court, 187 F. 2d 342.

Petitioner is now seeking a review of this case by petition for a writ of certiorari.

IX.

Commerce Trust Company's Exhibit 8.

Respondent Kopp is at a loss to understand the nature of the charges against him. Petitioner seeks to hold him in this case under a general allegation of conspiracy. So far as this record discloses, as is the fact, respondent Kopp has had no connection with any of this litigation since the trial of the Harper County suits in which he appeared in 1931 as a witness except the great burden of defending against numerous suits beginning after the middle of 1941. He has had his days, months and years in court defending against the unfounded charges of petitioner. The original petition did not name him as a party defendant (C-620-630). Respondent Kopp has examined the affidavits filed in this cause consisting of segregated excerpts widely separated, which do not reflect his real testimony in the Harper County proceedings. Respondent Kopp and his associate were employed by John Moffett and Thomas S. Moffett in their lifetime (W-97-98). Petitioner makes vicious assaults against Commerce Trust Company's Exhibit 8, prepared by this respondent and his associate. Petitioner in many places erroneously refers to Commerce Trust Company's Exhibit 8, as "being false," "worthless" and by the use of other like epithets. This respondent respectfully requests the Court to examine said Exhibit 8 in its entirety including the documents attached thereto as exhibits, the recitals of which have been garbled in some of the affidavits filed in this cause. As regards the testimony of this respondent, petitioner has apparently pursued the practice of quoting only excerpts from cross examination and entirely omitting testimony given in chief and on re-direct examination. Helen Weede's Exhibits 17 and 18 set forth (W-501-620) a considerable portion of this respondent's testimony given at the time petitioner took

his deposition in the Harper County proceedings prior to the trial. If petitioner seeks to hold respondent Kopp liable on the ground that he committed perjury in the Harper County trial, this respondent suggests that there is no basis in any documents filed in this cause for such an accusation (and in fact there could be no basis therefor) nevertheless under the law, respondent Kopp could not be held liable therefor in an action arising on account of alleged violation of rights accorded to petitioner by the Civil Rights Statutes and the 14th Amendment.

CONCLUSION.

In the Supreme Court of Kansas Petitioner raised all of these contentions concerning the aforesaid Exhibit 8 (See Helen Weede's Exhibit No. 49 (W-984)). Judge Harvey of the Supreme Court of Kansas in his opinion in 136 Kan. 711, l. c. 715-716 (C-31), in answering Petitioner's complaint concerning Commerce Trust Company's Exhibit 8 said: "There is no contention now that this summary was not an appropriate and accurate one compiled from the books of the partnership" (C-31). Petitioner has repeatedly reasserted these contentions in other courts and in all instances these courts have denied them.

On page 21 of Petitioner's petition reference is made to a secret conference had with the district judge by Messrs. Howard and Weede as emissaries of the Commerce Trust Company. In connection therewith we will suggest that the question of the secret conferences has been presented many times and has been completely answered in paragraphs (8, 9) of Judge Bratton's opinion in the case of *Moffett* v. *Robbins*, 81 F. 2d l. c. 436, and we earnestly request the court to read these paragraphs.

Petitioners persist in their fallacious contention that the decision in the *Howard Fee Case*, 345 Mo. 741, had the

effect of setting aside the Kansas and federal court decisions. This question is fully answered by the above quoted paragraphs from the decision in that case which especially state that the only question decided was that respondent Howard was not entitled to additional attorney fees. We will further suggest that the supreme court had no jurisdiction in the case before it to pass upon any question except the allowance of attorney's fees, of which the probate court had original jurisdiction and the circuit court and the supreme court had only derivative jurisdiction.

Right or wrong, the judgments and decisions assailed are final and binding on Petitioner. This is conclusively shown by the authorities presented in the briefs of respondents Helen Weede and Orlin A. Weede and of respondent Commerce Trust Company in the instant case. This Moffett litigation has been kept in the courts by the Petitioner and by her counsel for more than 20 years and it would seem that there should be an end to this litigation. Justice Story, years ago, in *Ocean Ins. Co.* v. *Fields*, 2 Story 59, F. Cas. No. 10406, made an observation which has direct application to this case. Chief Justice Taft referring to that case said:

> "It is for the public interest and policy to make an end to litigation; or as was pointedly said by a great jurist, THAT SUITS MAY NOT BE IMMORTAL WHILE MEN ARE MORTAL" (Emphasis ours).

From what we have said, we are convinced that the petition for a writ of certiorari should be denied.

Respectfully submitted,

B. C. Howard,
William Dennis Bush,
Attorneys for Respondents, B. C. Howard and William H. Kopp.

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JUL 2 19

CHARLES ELMORE

In the Supreme Court of the United States

No. 762.
October Term, 1950.

(Now No. 75,
October Term, 1951.)

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, *Respondents.*

BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit."

(b) "Petitioner's Brief in Support of Petition for Certiorari."

CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
PHILIP J. CLOSE,
Attorneys for Respondent Commerce Trust Company,
Addresses of Attorneys:
Commerce Building,
Kansas City, Missouri.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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It should be noted that all suits and claims filed by Commerce Trust Company in its respective representative capacities were based on the books of account (journals and ledgers) which had been kept for many years in the joint office of John Moffett and Thomas S. Moffett before the death of John Moffett, and kept thereafter by Thomas S. Moffett until the time of his death 9

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The opinions of the District Court are in 75 F. Supp. 303 and 87 F. Supp. 438; and the opinion of the Court of Appeals is in 187 Fed. (2d) 242. They also appear in the record, respectively, at (669-775; 775-784) and (Pro. 1-13) 11

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There appear in appellee (respondent here) Commerce Trust Company's Supplemental Record, as its Exhibits numbered 1, 2, 3, 4, 5, 16 and 17, copies made by photostatic process of the opinions, including syllabi, rendered in the cases hereinafter mentioned. The official volumes in which these cases are contained, the numbers of these cases respectively, the style of these cases respectively, and the syllabi of these cases respectively, the pages of the official reports in which these cases appear, and the pages of the reports appearing in the West Reporter system, and the pages on which same appear in our Record and comments concerning the nature of each of these cases 21

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Point 2. Petitioner invoked jurisdiction of the Federal court solely on the ground that the alleged action arose under certain provisions of the Federal Constitution and laws of the United States. (See appellant's record, pages 2, 3.) The lower court had jurisdiction to hear and sustain the motion to dismiss the second amended complaint for failure to state a cause of action (claim) upon which relief can be granted. Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action upon which petitioners could actually recover 44

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refused certiorari, and after the petitioner in one instance had filed in the Supreme Court of the United States all of the necessary and requisite papers to review by appeal the decision of the Missouri Supreme Court and the United States Supreme Court had dismissed the appeal and had later denied a lengthy petition for a rehearing —to set up and raise again the very questions decided against such litigant, and set the Federal courts up as an arbiter of the correctness of every state decision 45

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In the Supreme Court of the United States

No. 762.
October Term, 1950.

(Now No. 75,
October Term, 1951.)

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, *Respondents.*

BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit."

(b) "Petitioner's Brief in Support of Petition for Certiorari."

EXPLANATORY.

References herein to pages in: (1) Printed Record of Appellant (Petitioner here); (2) Supplemental Record of Appellee (Respondent here) Commerce Trust Company; (3) Supplemental Record of Appellees (Respondents here) Helen Weede and Orlin A. Weede; and (4) Record containing "Proceedings in the United States Court of Appeals," will be, respectively, made (1) by placing the page number in parenthesis thus: (15); (2) by placing the page number in parenthesis thus: (C15); (3) by placing the page number in parenthesis thus: (W15); and (4) by placing the page number in parenthesis thus: (Pro. 15).

Petitioner's printed record is sometimes referred to thus: (R15).

Unless otherwise indicated by the context, the word "complaint" as herein used means the Petitioner's "Second Amended Complaint," which was later amended by interlineation.

In the instant brief the Petitioner will be sometimes referred to as Appellant, and Respondent(s) will be sometimes referred to as Appellee(s).

Herein the suit instituted in the District Court of Harper County, Kansas, will, for brevity, sometimes be designated as Cause No. 7374.

STATEMENT.

This brief (see subdivision thereof captioned "FOREWORD") contains references to pages of our record wherein there are set forth true copies, reproduced by photographic process, of seven opinions which are either *specifically mentioned or definitely referred to in the complaint,* accompanied by our comments identifying the nature of each of these cases. In four of these cases petitioner sought review in this Court. Said part of our brief captioned "FOREWORD" contains specific references to each of these seven cases, which references are of an identifying nature, and, as regards these four cases, shows the places in our record where appear full copies of the "Specifications of Errors," and in the case reviewed by appeal, appellant's statement and designation under "Paragraph 9, Rule 13" of this Court, as filed in this Court. For the sake of brevity we suggest that the Court at this point examine the statements of facts in the opinions in the following cases, which statements meet with our approval, to-wit:

1. *Moffett* v. *Moffett,* 136 Kan. 582, 292 Pac. 947: Pages 583-585: These recitals are predicated upon the Court's examination of the transcript of the record.

2. *Clark* v. *Moffett,* 136 Kan. 711; 18 P. (2d) 255: The statements appearing on pp. 712 to 714. These recitals were predicated upon the transcript of the record.

3. *Moffett* v. *Robbins,* 14 Fed. Supp. 602; pp. 603 to 604: These recitals were based upon the allegations in petitioner's "Third Amended and Supplemental Bill in Equity," together with an amendment thereto.

THIS BILL WAS FORMULATED ENTIRELY BY PETITIONER'S COUNSEL, AND SHOWS ON ITS FACE THE VARIOUS MOTIONS DIRECTED AGAINST FORMER BILLS FOR BETTER STATE-

MENT OF CLAIM, AND THE RELUCTANT EFFORTS OF PETITIONER TO FINALLY COMPLY WITH THE ORDER OF THE COURT, SUSTAINING SUCH MOTIONS.

4. *Moffett* v. *Robbins*, 81 Fed. 431; pp. 433 to incomplete paragraph on p. 435. Therein Judge Bratton carefully analyzes all of the bill of petitioner and painstakingly analyzed and stated the contentions thereby asserted by her.

For the sake of brevity, and in order to avoid duplication, we adopt as part of our STATEMENT the Statement of Respondents Weede made at the beginning of their opposition brief.

John Moffett died August 27, 1927, and shortly thereafter his brother Thomas qualified as executor of his estate. On February 7, 1928, he filed in the Probate Court a verified inventory and appraisement of the estate of John Moffett (C506-513), on pp. (C509-511) of which there appear references to the status of his personal connection with the various partnerships and the inter-obligations between himself and these partnerships, and between the partnerships themselves. He continued to act as such executor until the appointment of his successor on November 28, 1928, having been removed by an order entered November 7, 1928. In the order appointing his successor (C411) it was ordered that he make his final settlement with his successor on or before December 15, 1928. What transpired during the period between the date of his appointment and August 17, 1928, the date of the filing of the application by Respondent Helen Moffett (now Weede) can best be learned from examination of her petition for removal, appearing in (R398-416). It appears therefrom that this motion contained recitals concerning his obligations to the various partnership estates and the obligations of the various partner-

ship (of which he was a member) to other partnerships. One of the complaints made in the said motion was that during his almost eight months of service as executor he had failed both as executor and as surviving partner to institute actions which should have been promptly brought to protect against the running of the statutes of limitations. This motion contains many allegations which show the differences which had arisen between Mr. Moffett as executor and the widow and heirs and devisees of John Moffett, as to his conduct in not protecting their interests, and otherwise.

Thomas Moffett later filed his Final Settlement as executor. Exceptions were filed thereto and the Court, after a hearing, modified and approved same on February 7, 1929 (C516-521), and directed him as executor to turn over and deliver to his successor the various items of property therein described (C517) and to deed to Commerce Trust Company as such successor, the Hymer Ranch located in Morris and Chase Counties in the State of Kansas, which had been acquired by him during the period of administration, with funds belonging to the estate of John Moffett.

During the interval between February 7, 1929, and the trial of Cause 7374, petitioner on February 5, 1931, filed in the Circuit Court of Jackson County, Missouri, a suit numbered 341-312, a full copy of the petition in which suit appears (C521-534), wherein she sought to restrain the defendants from prosecuting the various claims then pending, except in said cause and in the Circuit Court of Jackson County, Missouri. The names of the parties appear on (C521-522). On March 16, 1931, she filed in the last-named cause her first amended petition seeking the same relief; a full copy thereof appears on (C534-552). In 1932, she filed a Supplemental and Amended Petition in the same cause praying for the same

relief. The parties named in this petition are the same as those named in the prior petitions, except that Grace Torrance Clark was omitted as a party plaintiff by reason of orders made by the court. This cause remained pending until *July 13, 1948* (W861) at which time it was voluntarily dismissed without prejudice by petitioner.

On August 15, 1929, Thomas S. Moffett instituted Cause 7374 for partition of the Moffett Brothers partnership real estate in Kansas, and for an accounting. (On July 9, 1929, he instituted in the Clay County, Missouri, Circuit Court a suit to partition lands in that county belonging to the partnership estate of Moffett Brothers. Reference to that proceeding will be made in another part of our brief.) On July 14, 1929, the Harper County Court overruled petitioner's demurrer to the answer of defendant Helen Moffett (now Weede), and sustained Commerce Trust Company's application for leave to intervene. An appeal was taken from these orders, and the lower court was affirmed by the opinion in 131 Kan. 582, handed down on November 8, 1930, which has been and will be frequently referred to in the various briefs. Thomas S. Moffett died in December, 1930, and Cause 7374 was revived against the petitioner and Grace Torrance Clark, his administrator. Following the order of reviver Mrs. Moffett and Mrs. Clark filed application for removal of Cause 7374 to the Kansas District Federal Court, in which there were filed Motion to Remand and Plea to the Jurisdiction. On April 20, 1931 (W262), Judge John C. Pollock, judge of that court, denied this motion and this plea. During the interval all of the parties to 7374, including Commerce Trust Company, as Intervener, entered into a Stipulation for an accounting, a full copy of which is set out in the Statement of Respondents Weede. R. O. Robbins, administrator of the

estate of John Moffett in Kansas, intervened on June 15, 1931. For his intervening petition see (C754-760). The trial of the Harper County suit commenced in the early part of October, 1931, and consumed many days. The court made Finding of Facts and Conclusions of Law January 12, 1932, and rendered judgment on January 13, 1932. (The Journal Entry of Judgment, which is provided for and required by the rules governing district courts promulgated by the Supreme Court of Kansas, was entered on March 5, 1932.) An appeal was taken to the Supreme Court of Kansas, which, on January 28, 1933, affirmed the lower court (C27). During the interval between 1933 and 1940, many additional proceedings were had. There was first the effort to procure this Court to review Cause 7374 by certiorari, and later, petitioner sought to restrain the enforcement of the judgments in Cause 7374 by proceedings instituted in the Kansas District Federal Court. When that court dismissed her complaint for failure to state a cause of action (as he stated), the petitioner appealed from that judgment to the Court of Appeals for the 10th Circuit, which sustained the lower court. Thereupon she sought certiorari in this Court, which was denied. (All of the foregoing facts appear definitely in other parts of our brief.) On August 22, 1941, she in her individual capacity brought suit against all of the present defendants except defendant Kopp and Copman. In the present complaint she alleges that this suit was brought for the same damages and on account of the same overt acts which are mentioned in the complaint in the instant case (R29). Later she filed an amended complaint in which she added herself in her representative capacity as a party plaintiff and named defendants Kopp and Copman as additional parties defendant. Successive amended petitions were filed and demurrers thereto were sustained by the follow-

ing judges who passed on different separate amended petitions, to-wit: Judge Ben Terte, Judge Emory Wright and Judge Albert A. Ridge (who passed on the Fifth Amended petition), now judge of the United States District Court for the Western District of Missouri.

Following the orders of Judge Ridge made in December, 1944 (following his sustaining of the demurrer), an appeal was taken to the Supreme Court of Missouri, in which the lower court was affirmed. *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. (2d) 588; opinion filed February 11, 1946. Rehearing denied April 8, 1946 (C. 48). It is interesting to note the contentions made by petitioner in that case, because they are identical with nearly all of the contentions now asserted by petitioner before your Court. They appear in this opinion on pp. 1099-1105, and also in (C49-55).

An appeal was taken from the last-named decision to this Court. For copy of her petition filed in the Supreme Court see our record pages (C436-443). This Court dismissed the appeal on October 14, 1946 (R70) and rendered a *per curiam* opinion in which the following cases were cited: *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 165; *Utley* v. *St. Petersburg,* 292 U. S. 106, 111. We regard the citing of these opinions as significant.

In the Utley case, l. c. 112, the Court said:

> "The federal questions are unsubstantial; the nonfederal question is genuine and adequate."

In the Enterprise case there are recitals which we think very significant. The following, however, is a very pertinent one:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

The petitioner filed a lengthy motion for a rehearing, full copy of which appears (C448-505). This motion was denied on November 12, 1946 (C506). The instant suit was brought in the District Court on February 7, 1947, and remained in that court until it was finally dismissed with prejudice on December 1, 1949. A previous order to dismiss was sustained on December 11, 1947.

On October 15-16, 1947, oral hearings were had in the District Court, the transcript of which covered 164 pages (C937). There were many other oral hearings before the court. We contend that Commerce Trust Company, in its respective representative capacities, was not an agent or functionary of the State, and confidently assert that our contention is supported by our brief on that question hereinafter appearing. We further contend that under no circumstances do the allegations in the complaint show any facts which would make it liable to the petitioner for alleged violation of her rights under the Civil Rights Acts and the XIVth Amendment either as alleged co-conspirator or otherwise. In short, we contend that, stripped to its essence, petitioner's allegations are that the present defendants conspired with certain judges who were state officers, and that there are no recitals in the complaint which would make these judges liable if they were parties to the suit, the sole contention made against them being, at the most, that they rendered erroneous decisions.

Petitioner refers to transactions concerning "Oklahoma lands." For information as to what happened concerning them we refer the Court to pages (C721 to 735, both inclusive).

Petitioner also refers to "Hymer Ranch." For information as to what happened concerning it we refer the Court to our record (C689 to C709) for proceedings in the Probate Court of Jackson County, Missouri, concern-

ing its sale and as regards proceedings in the Probate Court of Morris County, Kansas, concerning this sale, we refer to pages (C710 to C720).

The judgment for $143,829.06 rendered in the District Court of Harper County, Kansas, in Cause 7374 was rendered in favor of R. O. Robbins, administrator, with the will annexed of the estate of John Moffett (R33), and the enforcement thereof was conducted by him. The court appointed sheriffs of the respective counties in which the lands were located as agents of the court to make the sale. These sales were all reported to the court and approved and confirmed by the court, after due notice to all of the parties. For information concerning the confirmation of these sales, see (C862-873). No appeals were taken from these orders of confirmation, which were rendered on divers dates, the first on April 21, 1934, and the last on January 26, 1935.

It should be noted that all suits and claims filed by Commerce Trust Company in its respective representative capacities were based on the books of account (journals and ledgers) which had been kept for many years in the joint office of John Moffett and Thomas S. Moffett before the death of John Moffett, and kept thereafter by Thomas S. Moffett until the time of his death.

Petitioner assails the validity of the appointment of Commerce Trust Company because of her allegation that same was drafted by Respondent B. C. Howard while in its employ. This will was executed on February 21, 1921, at which time there was in full force and effect a Missouri Statute, R. S., 1919, Sec. 11804, the full text of which appears as Item 3 in our Appendix. (This Statute was enacted in 1915 and has appeared without change since that time, and is now R. S. Mo., 1945, 363.230.) The will of John Moffett appears in full in petitioner's

record in (R109-110), and contains the following declaration made therein by testator:

> "• • • and I hereby certify that before the execution of this my last will and testament, I had advice and counsel in relation thereto from someone not under salary from Commerce Trust Company, who may become executor hereunder."

Notwithstanding this recital and this statute, neither the petitioner nor any other person has every attempted to procure the removal of Commerce Trust Company in any capacity or on any ground. It was appointed as executor *de bonis non* on November 28, 1928, and as administrator of the partnership estate of Moffett Brothers on December 28, 1928, and as administrator of the partnership firm of Moffett Brothers and Andrews on the same date, and has continued in those capacities down to the present hour. After the appeal from the lower court was lodged in the Court of Appeals for the 8th Circuit (R736) (R753), petitioner sought to enjoin the prosecution of Cause 339-134 then pending before a referee in the Circuit Court of Jackson County, Missouri, in which Commerce Trust Company, in its capacity as administrator of the partnership estate of Moffett Brothers and Andrews, was plaintiff, and an oral hearing was had on her application. On March 8, 1950 (R763), the Court of Appeals denied them in all respects. Thereafter petitioner filed a petition for rehearing (R764). This petition was denied on March 25, 1950 (R767).

Petitioner does not charge and cannot truthfully charge that Commerce Trust Company in its respective personal or individual capacities was in anywise *pecuniarily* interested in any of the estates which have been administered by it throughout the years. In a brief filed in the lower court she did contend that Commerce Trust Company had a motive on account of the statutory fees that

might inure to it. As regards the main judgment for $143,829.06, it is evident that the statutory compensation which inured on that account would inure to R. O. Robbins, administrator, in whose favor same was rendered and who conducted the proceedings to enforce this judgment.

Despite the many epithets hurled at respondent Commerce Trust Company we most respectfully say that throughout this prolonged litigation it has conscientiously attempted to perform the duties devolving upon it and this under very trying circumstances because of the dissensions and difference between the parties *actually* and *pecuniarily* interested in these estates.

OPINIONS BELOW.

The opinions of the District Court are in 75 F. Supp. 303 and 87 F. Supp. 438; and the opinion of the Court of Appeals is in 187 Fed. 2d 242. They also appear in the record, respectively, at (669-775; 775-784) and (Pro. 1-13).

RESPONSE OF RESPONDENT COMMERCE TRUST COMPANY TO PETITIONER'S STATEMENT ON "JURISDICTION" APPEARING ON PAGES 2 AND 3 OF HER PETITION.

The lower court did not have jurisdiction on the ground of diversity of citizenship. See Point I in later part of this brief entitled, "Statement of Additional Points," etc.

Petitioner did not seek to have the instant case reviewed by appeal but sought to have same reviewed by the Writ of Certiorari. As indicated by her prayer appearing on pages (27-28), she prayed for an order directed to the United States Court of Appeals for the 8th Cir-

cuit to certify and send to this Court a full and complete transcript of the record, etc.

Sec. 5 of Rule 38 of this Court provides that a review on Writ of Certiorari is not a matter of right, but of sound discretion. This Court in the exercise of its sound discretion has the right to determine whether or not the application for the Writ will be granted or denied, and this in accordance with the procedure which has prevailed and obtained in the Supreme Court of the United States for several generations, and this in the manner stated in the very recent opinion of this Court in the case of *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 94 L. Ed. 562 (decided on January 9, 1950), which case follows an unbroken line of decisions covering a space of many years.

Petitioner seeks to review the construction made by the Court of Appeals of certain provisions of the Civil Rights Act; also to review the alleged failure of the Court of Appeals "to give full faith and credit and *res judicata* effect to the decision of the Supreme Court of Missouri *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751," contending that this decision established that the "Judgment entries and orders" of the District Court of Harper County, Kansas, were void.

Petitioner further contends that "the complaint (R. 2-33) with Exhibits (R. 33-71) does state a valid claim for relief within the jurisdiction of the Federal Courts under the Civil Rights Acts, and that this contention was decided adversely to the petitioner in the United States Court of Appeals." We seriously challenge the contention that the opinion or decision in the 345 Mo. 741 case had any *res judicata* effect on the judgments and orders of the Harper County District Court, or that any of the same were void, and that these contentions are without merit, and that our contrary contention is abundantly sustained by the alle-

gations in petitioner's complaint and in exhibits attached thereto and by said complaint made a part thereof.

We further contend that it appears from the allegations of said complaints and the exhibits thereto attached that plaintiff's complaint fails to state a claim or cause of action and that the lower court did not commit error in so deciding, and that the Court of Appeals did not commit error in affirming the opinion of the lower court.

We further contend that there is nothing in the complaint or in the exhibits thereto attached which shows that petitioner was deprived of any right redressable under the provisions of the Civil Rights Acts, and that the Court of Appeals did not err in its construction of the provisions of the Civil Rights Acts enumerated in said statement on jurisdiction.

RESPONSE OF RESPONDENT COMMERCE TRUST COMPANY TO PETITIONER'S STATEMENT ON PAGES 4 TO 13, BOTH INCLUSIVE, OF HER PETITION.

We do not agree with petitioner's initial recital that her complaint is clear. We contend that it is "vague," "indefinite," "uncertain," "involved," "confusing," "equivocal," "ambiguous," and in many places misleading. We contend that her Statement is not clear and that it is afflicted with the same vices.

It was our initial purpose to take up the items of this Statement one by one and fully refer to and discuss them. After we had devoted many hours to this effort and received a galley proof of part of our copy we found that to do so would result in expanding our brief beyond any proper bounds. In consequence we are setting forth only a few of the initial statements in an effort to furnish examples in support of our contentions. Had we pro-

ceeded, the same situation would have been apparent in many other parts of this Statement.

> (Page 4) "In accomplishing said purpose respondents requested said 'special' judge to remove Thomas S. Moffett as executor of the John Moffett estate * * *,"

The alleged request for the removal of Thomas S. Moffett was not made by any respondent other than respondent Helen Moffett. Petitioner's record on pages 398 to 416 shows duly authenticated and certified copies of (1) the notice dated August 17, 1928, calling up for hearing the Application for Revocation of Letters, and (2) the Application for Revocation of Letters filed August 20, 1928, signed and verified by Helen Moffett now Weede.

> (Page 4) That said request was made "* * * on the ground that the interests in said estate and the partnership estate which he was administering were in conflict."

This application consists of 13 pages plus exhibits covering 4 pages, and in the initial paragraph thereof Helen Moffett designated herself as the widow of John Moffett, deceased, and prayed the court to remove Thomas S. Moffett as executor, and therein stated many reasons why same should be done.

It is true that among the many grounds alleged in support of her application, the applicant stated facts showing that the personal or individual interest of Thomas S. Moffett conflicted with his duties in his capacities as (1) executor of the will of John Moffett, (2) as surviving partner of the partnership estate of Moffett Brothers (of which he was a member), and (3) as one of the surviving partners of the partnership estate of Moffett Brothers &

Andrews (a partnership estate whose members were John Moffett, Thomas S. Moffett and L. B. Andrews).

> (Page 4) "Thereupon, on the application of Commerce Trust Company, the same special probate judge * * * appointed Commerce Trust Company to act in the same identical conflicting capacities, * * *"

The order of the court sustaining the application for the removal of Thomas S. Moffett was made on November 7, 1928. The order appointing Commerce Trust Company executor *de bonis non* was made on November 28, 1928 (C407-410). This order is entered exactly in the form approved by the probate judge and also by "H. M. Beardsley, attorney for Thomas S. Moffett, executor, and A. E. Watson, attorney for Thomas S. Moffett"; a photostatic copy of the same, on which said signatures appear, is set forth on page 411 of the printed record of Commerce Trust Company.

> (Pages 4-5) "Thereupon Commerce Trust Company, notwithstanding there were sufficient assets in Missouri to satisfy a groundless claim made by it (R. 24) * * * was permitted by said state district judge, in direct violation of the laws of the State of Kansas, to intervene in said conflicting capacities * * *."

This statement is not correct. The proceedings in cause 7374 were not instituted until *August 15, 1929*. On *August 9, 1929* (W347), Thomas S. Moffett filed in the Circuit Court of Clay County, Missouri, a petition for the partition of the Clay County lands belonging to Moffett Brothers Partnership and for an accounting, naming as parties defendants Commerce Trust Company in its two capacities and the widow and heirs of John Moffett. In Paragraph 5 thereof (W347) it was alleged that the Commerce Trust Company was the duly acting executor *de bonis non* of the will and estate of John Moffett and the

duly appointed and acting administrator of Moffett Brothers Partnership in Missouri. It recited (W348):

> "• • • That dissensions and controversies have arisen • • • as to the correct status, rights and liabilities of the respective partners therein, which can only be determined by a court of equity upon an accounting had, and the respective rights of the parties adjudicated and determined."

This petition (W349) concluded with a prayer praying for an accounting.

On June 9, 1930 (C661-664), said Moffett filed an amended petition against the same defendants but omitting Commerce Trust Company in its two capacities as parties defendant.

On June 9, 1930, Commerce Trust Company filed applications to intervene in cause 7374 and was permitted to intervene by an order entered in said cause on July 14, 1930. Thomas S. Moffett appealed from this order in the Supreme Court of Kansas, and (131 Kan. 582) that court on November 8, 1930, affirmed the lower court. The trial of cause 7374 was not begun until October, 1931, and as regards Commerce Trust Company was tried on its Amended and Supplemental Intervening Petitions in its capacity as executor *de bonis non* of the will and estate of John Moffett, and as administrator of the partnership estate of Moffett Brothers, respectively, which intervening petitions were filed on June 15, 1931, and, respectively, appear on pages (C917-922) and (C922-929).

The prayer of Commerce Trust Company as executor in the first intervening petition is set forth on pages (C921-922). The prayer of Commerce Trust Company as administrator of the partnership estate of Moffett Brothers is set forth on pages (C927-928). The reading thereof will disclose that Commerce Trust Company did not prosecute a claim in behalf of the John Moffett es-

tate. It is important in this connection to mention the "Separate Supplemental Amended Answer of Helen Moffett, defendant" filed in in said cause 7374 on February 19, 1931 (W1019), the full copy of which appears on (W1019-1037).

> (Page 4-5) "Thereupon Commerce Trust Company * * * knowing that petitioner's testator had retained a local counsel who was unpopular with the state district judge (R. 161-162) * * *."

A careful search of the complaint shows no allegation therein concerning this unwarranted allegation. Petitioner's reference (R. 161-162) relates to her affidavit verified on September 12, 1949, and we assume that this recital is intended to direct attention to the following part of this affidavit:

> "Affiant further states that Mr. E. C. Wilcox was retained during Thomas S. Moffett's lifetime, and we never knew of the matters and things stated in the opinions of the Supreme Court of Kansas reported in *State* v. *Wilcox,* 90 Kan. 80, *Ex parte Wilcox,* 90 Kan. 95, *Horner* v. *Shinstock,* 77 Kan. 663, *Horner* v. *Shinstock,* 80 Kan. 136, until after the affirmance by the Supreme Court of Kansas of the original decisions by the District Court of Harper County, Kansas. Affiant observed that during the proceedings in said court Judge Hay treated Mr. Wilcox with the utmost discourtesy and lack of consideration."

The opinions in *State ex rel. Wilcox,* 90 Kan. 80, and *In re the Disbarment of E. C. Wilcox,* 90 Kan. 95, were handed down on the same day, June 7, 1913. The opinion in the first mentioned case is an opinion rendered on appeal from an action in which Wilcox and others were charged with criminal libel on the grounds that they had vilified and defamed P. B. Gillett, who was a Kansas District Judge. Wilcox was acquitted and the other de-

fendants who were found guilty appealed. The opinion in 90 Kan. 95 was an original proceeding in the Kansas Supreme Court to disbar E. C. Wilcox and the court directed the entry of a judgment of disbarment.

We cannot see the slightest relevancy of these two cases to any issues in this case. In passing we might say that the recitals which appear in these two opinions are most interesting and disclose a sordid state of affairs where parties seek to influence judicial action by attempting to defame and libel a judge. Affidavits were circulated charging him with misconduct with a girl of less than eighteen years of age.

We respectfully submit there is nothing in the affidavit of Mrs. Moffett which justifies the ugly and false insinuations that Commerce Trust Company had intervened in the Kansas litigation because of the unpopularity of Mr. Wilcox with the district judge, or that it even had any knowledge of such unpopularity, if same in fact existed. Thomas S. Moffett, as plaintiff, selected the forum in which to bring his partition accounting suit but it was necessary that same be instituted in the District Court of a county in which the real estate sought to be partitioned was located.

The record does not disclose when Wilcox was again permitted to practice law nor when he was first employed in cause 7374. The petition (373-78) in that case filed on August 15, 1929, shows that at the time of its filing he was represented solely by Mr. A. E. Watson, who was a veteran Kansas lawyer and was Mr. Moffett's attorney during his lifetime and likewise was the attorney for the petitioner from the time of the death of her husband up to the time of Mr. Watson's death in 1949.

Frankly, we cannot see anything in *Horner* v. *Shinstock*, 77 Kan. 663, or in *Horner* v. *Shinstock*, 80 Kan. 136, which

has the slightest relevancy to the recitals appearing in Mrs. Moffett's affidavit.

The record further shows that Wilcox lived in the town of Anthony which was the county seat of Harper County, where a substantial part of the partnership real estate was located.

> (Page 5) "Commerce Trust Company * * * was permitted by said state district judge * * * to intervene * * * and to prosecute said unfounded claim as executor of the John Moffett estate against itself as Missouri administrator of Moffett Brothers partnership estate and on March 5, 1932, to make a void judgment entry of $143,828.96 against itself in said capacity in favor of said John Moffett estate."
>
> (Pages 4 and 5) "Commerce Trust Company * * * was permitted by said state district judge * * * to intervene * * * and to prosecute said unfounded claim as executor of the John Moffett estate against itself as Missouri administrator of Moffett Brothers Partnership estate and on March 5, 1932, to make a void judgment entry for $143,829.96 against itself in said capacity in favor of said John Moffett estate."

The foregoing recitals are vague, indefinite and confusing and do not accurately state the facts.

The judgment in this case was rendered in favor of "intervenor" R. O. Robbins, administrator with the will annexed of the estate of John Moffett. Petitioner's statement is calculated to create the impression that this judgment was in favor of Commerce Trust Company. Her complaint itself clearly shows this because in her Exhibit "A" attached to the complaint there appears *in haec verba* a copy of a short, expurgated recital (entirely stripped from its contents), taken from the Journal Entry of Judgment which consists of many pages, showing that Mr. Robbins in his capacity of administrator of the John Moffett estate recovered this judgment.

Frankly, we cannot see any justification for this clearly appearing situation being presented to this Court in such ambiguous and misleading language.

Petitioner makes this allegation in face of the fact that the proceedings culminating in the opinion in *Moffett* v. *Robbins* (14 Fed. Supp. 602), and *Moffett* v. *Robbins* (81 Fed. Supp. 2d 431), show that therein she sued R. O. Robbins as such administrator to restrain the enforcement of the identical judgment above referred to.

R. O. Robbins was appointed ancillary administrator of the estate of John Moffett, deceased, in Kansas shortly after the death of John Moffett in 1927, over three years prior to the death of Tom Moffett.

The intervening petition of R. O. Robbins as administrator with the will annexed of John Moffett, deceased, was filed in cause 7374 on June 15, 1931, and appears in full in (C754-760) and the prayer thereof appears on (C760).

Response of respondent Commerce Trust Company to petitioner's Statement appearing on pages 1-11 of her brief.

What we have said in our references to the Statement appearing in her petition apply with equal force to some of the statements in her brief, and for the reasons stated in the preceding section we have not attempted to point out the vague, erroneous, incorrect and misleading statements there, a few of which are repetitions of the recitals appearing in the Statement.

We desire to bring to the attention of this Court recitals appearing at the bottom of page 19 of petitioner's brief. The quoted paragraph is not preceded or followed by asterisks. It is wrested and stripped from a lengthy paragraph appearing in our record on pages 120 to 122. The signatures appearing at the end of page 19 are quoted from what appears on page (C129) which is 8 pages removed from the quoted excerpt.

FOREWORD.

There appear in appellee (respondent here) Commerce Trust Company's Supplemental Record, as its Exhibits numbered 1, 2, 3, 4, 5, 16 and 17, copies made by photostatic process of the opinions, including syllabi, rendered in the cases hereinafter mentioned. The official volumes in which these cases are contained, the numbers of these cases respectively, the style of these cases respectively, and the syllabi of these cases respectively, the pages of the official reports in which these cases appear, and the pages of the reports appearing in the West Reporter system, and the pages on which same appear in our Record are respectively as follows:

Exhibit Number	Number and Style of Case	Pages of Our Record
1	No. 29,807—Thomas S. Moffett, Appellant, v. Helen Moffett, the Commerce Trust Company, Executor *de bonis non* of the Will and Estate of John Moffett, Deceased, and the Commerce Trust Company, Administrator of the Partnership Estate of Moffett Brothers, et al., Appellees. —131 Kan. 582, 282 Pac. 947..... (This is the opinion on the first appeal from the Harper County, Kansas, District Court in cause No. 7374.)	19-25
2	No. 30,826—Grace Torrance Clark, Administratrix with the Will Annexed of the Estate of Thomas S. Moffett, Deceased, and Louise McGrew Moffett, Appellants, v. Helen Moffett, et al. (The Commerce Trust Company, Executor *de bonis non* of the Estate of John Moffett, De-	

ceased, the Commerce Trust Company, Administrator of the Estate of Moffett Brothers, and R. O. Robbins, Administrator with the Will Annexed of John Moffett, Deceased, Interveners), Appellees.—136 Kan. 711, 18 Pac. 2d 555..... 26-39

(This is the opinion on the second appeal from the Harper County, Kansas, District Court in cause No. 7374. Petition for Certiorari was docketed in this Court as case "No. 181, October Term, 1933." Cert. denied October 9, 1933 (290 U. S. 642). December 11, 1933, motion for leave to file petition for rehearing denied (290 U. S. 602). For Specification of Errors see (C427-430, inclusive).)

3 No. 1307—Moffett, et al., v. Robbins.—81 F. 2d 431..... 40-46

(This is the opinion rendered by the United States Court of Appeals for the Tenth Circuit, on appeal from the decision of the United States District Court of Kansas mentioned in the next succeeding item. Certiorari docketed as case "No. 918, October Term, 1935." Cert. denied May 18, 1936 (298 U. S. 6[illegible]). For Specification of Errors see pages (C432-434 incl.).)

4 No. 436—Moffett, et al., v. Robbins.—14 F. Supp. 602..... 46a-46d

(This is the opinion of the United States District Court of Kansas dismissing petitioner's complaint to restrain and enjoin the enforcement of the judgments rendered in the District Court of Harper County, Kansas, in cause No. 7374. See next preceding item for opinion on appeal.)

5 No. 39509—Louise McGrew Moffett and Louise McGrew Moffett as Executrix of the Estate of Thomas S. Moffett, Deceased, Appellants, v. Commerce Thust Company, a Corporation, Helen Weede, B. C. Howard, and William H. Kopp.—354 Mo. 1098, 193 S. W. 2d 588..... 48-80
(This exhibit contains the court reporter's Statement of Points and Authorities consisting of many pages, as published in the official report. Petitioner appealed from decision in this case. Appeal was docketed as case "No. 318, October Term, 1945." She filed in this court Assignment of Errors theretofore filed on June 21, 1946, in Missouri Supreme Court; for same see (C436-442, both incl.). On August 1, 1946, she filed "Appellant's Statement and Designation under Paragraph 9, Rule 13." Same appears on page (C443-448, incl.). October 14, 1946, this court granted motion of respondents to dismiss appeal and rendered its *per curiam* opinion reported in 329 U. S. 669. Same is also set forth in Exhibit "I" to petitioner's complaint. Thereafter petitioner filed a Motion for Rehearing consisting in all of 64 printed pages. Said motion appears on pages (C448-505). Motion for rehearing was denied on November 12, 1946 (C506).)

16 No. 30567—Clark v. Andrews, et al.—136 Kan. 23, 13 Pac. 2d 294..... 251-259
(On January 5, 1931 (C253), Grace Torrance Clark was appointted administratrix of the Estate of Thomas S. Moffett in Kansas; and on January 8,

1931, she secured an order of the Probate Court of Wyandotte County, Kansas, directing her to take into her possession all of the partnership assets of the following dissolved partnerships: Moffett Bros., Moffett Bros. & Andrews, and Andrews, Lewis & Moffett. L. B. Andrews, a member of two of these partnerships, filed a motion to modify the last order; and the Probate Court made an order modifying the January 8 order, the effect of which was to withdraw from Mrs. Clark the right to administer the partnership estates of Moffett Bros. & Andrews, and Andrews, Lewis & Moffett. Mrs. Clark appealed to the District Court of Wyandotte County, which reversed the order of the Probate Court. Andrews appealed to the Supreme Court of Kansas, which, in the opinion above referred to as Exhibit 16, rendered on July 9, 1932, reversed the decision of the District Court and directed that: "The judgment of the district court is reversed, with directions to sustain the order of the probate from which the appeal to the district court was taken." *Commerce Trust Company was not in any capacity a party to this litigation.*)

17 No. 29495—Moffett v. Moffett, et al.—131 Kan. 546, 292 Pac. 942..... 263-273
(This opinion was rendered on November 8, 1930, on appeal from a decision of the District Court of Comanche County, Kansas, of which Karl Miller was Judge, which decision involved the litigation which in the instant case is commonly referred to as the "Co-

manche County litigation" or by like designation. The decision of the District Court was in favor of Helen Moffett, now Respondent Helen Weede. The Supreme Court of Kansas affirmed "the entire judgment" of the lower court (C273). The Comanche County litigation is frequently referred to in the complaint and will be referred to in our brief in the instant case. *Commerce Trust Company was not in any capacity a party to this litigation.* Certiorari docketed in Supreme Court as case "No. 700." The Specification of Errors appears in (W318-319) and on pages (W317-318) appear the jurisdictional statement and authorities cited to sustain jurisdiction. This court denied certiorari on March 9, 1931. (283 U. S. 825; 75 L. Ed. 1440).)

All of the opinions mentioned above were either specifically cited or definitely referred to in appellant's second amended complaint as more fully appears in our Statement which immediately follows.

Exhibits 1 to 5, both inclusive, are by appellee Commerce Trust Company (respondent here), expressly made a part of Part III (C9) of its "Amendments" filed April 2, 1948 (being respondent Commerce Trust Company's motion to dismiss for failure to state a claim) (C7 and following), and are respectively referred to and described therein (C13).

We have prepared the foregoing tabulation, hoping that it may be of some aid and assistance to the members of this Court in having before them in compact and readily available form the full text of the foregoing opinions.

REFERENCES TO PROCEEDINGS IN OTHER RELATED CASES IN FEDERAL AND STATE COURTS:

A. Unpublished opinion of Hon. John C. Pollock, judge of the United States Court for the District of Kansas.

B. Suits filed in the Supreme Court of Missouri on April 2, 1930, numbered respectively: No. 30533, No. 30534 and No. 30535.

C. *Zombro* v. *Moffett et al.* (Mo.), 44 S. W. 2d 149.

A.

On pages 262-266 of Supplemental Record of Appellees (now respondents) Weede, there appears the unpublished opinion (styled "Memorandum of Decision on Motion to Remand and on Plea to the Jurisdiction of the Court") of Hon. John C. Pollock, Judge of the United States District Court for the State of Kansas, rendered on April 20, 1931 (filed with the court clerk on April 21, 1931), on Motion to Remand and Plea of Jurisdiction in a proceeding to remove Cause No. 7374 to the United States District Court for Kansas. Commerce Trust Company in each of its capacities was named in the caption of this opinion.

Judge Pollock's Memorandum Decision includes the following sentence: "It follows, the Motion to Remand and the Plea to the Jurisdiction must be and are sustained." The petition for removal of Cause 7374 to the Federal District Court was referred to on the bottom of page 721 and the top of page 722 in *Clark* v. *Moffett*, 136 Kan. 711.

B.

On pages 379-384, both inclusive, of the Supplemental Record of Appellee (now Respondent) Commerce Trust Company, and on pages 386 to 388, both inclusive, thereof,

and on pages 390 to 394, both inclusive, thereof, there appear certified copies of the Applications of Thomas S. Moffett, the petitioner therein, for Writs of Certiorari in Causes filed in the Supreme Court of Missouri on April 2, 1930, numbered in said court respectively as No. 30533, No. 30534 and No. 30535. On pages (C385) (C389) and (C394), respectively, there appear certified copies of orders made in the Supreme Court of Missouri on the 15th day of May, 1930, showing that the respective petitions for certiorari in the three causes, No. 30533, No. 30534 and No. 30535, were denied. Each of these appplications or petitions for certiorari was directed against "Jules E. Guinotte as Judge of the Probate Court of Jackson County, Missouri, at Kansas City, Respondent." These applications were verified by said Thomas S. Moffett, and therein he expressly stated that Commerce Trust Company was on the 28th day of November, 1928, appointed Executor *de bonis non* of the estate of John Moffett, deceased, and that thereafter, on the 28th day of December, 1928, Commerce Trust Company made application and executed a bond as required by law, and was appointed Administrator of the partnership estate of Moffett Brothers (and of the partnership estate of Moffett Brothers & Andrews) "and ever since said time has been and is now administering upon said estate."

C.

***Zombro* v. *Moffett et al.* (Sup. Ct. Mo.), 44 S. W. 2d 149 (not reported in the official reports).**

The Zombro case is referred to by the Supreme Court of Kansas in its opinion in the case of *Clark* v. *Moffett*, 136 Kan., l. c. 713, as follows:

> "When the action went back to the trial court, broadly speaking, the only controversy between the parties was with respect to the accounting. The will

> **of John Moffett had been construed as it affected some of the beneficiaries, both by this court (*Moffett* v. *Moffett*, 131 Kan. 546, 292 Pac. 942) and by the Supreme Court of Missouri (*Zombro* v. *Moffett*, (Mo.), 44 S. W. 2d 149).''**

The Zombro case involved the construction of the will of John Moffett and the parties in the suit were Ethel Zombro, his niece, as Plaintiff and the following parties as Defendants: Thomas S. Moffett, executor, Thomas S. Moffett, brother of testator, and Louise McGrew Moffett, his wife, R. J. Moffett, brother of testator, and Bessie Moffett, his wife, J. W. Moffett, unmarried brother of testator, Jennie Lynn, sister of testator, and John C. Lynn, her husband, Annie M. McKee, sister of the testator, and B. S. McKee, her husband, and Helen Moffett, widow of testator. The Zombro case is referred to in the complaint.

In the opinion in *Zombro* v. *Moffett*, 44 S. W. 2d 149, there appears on page 150 a full copy of the will of John Moffett, paragraph 5 of which reads as follows:

> "5. I hereby nominate and appoint my brother, T. S. Moffett, executor of this, my last will and testament, and request that he be permitted to act as such without giving bond and in case of the death of said T. S. Moffett or his inability or refusal to act, then I nominate and appoint Commerce Trust Company, a corporation of Kansas City, Missouri, executor of this, my last will and testament, *and I hereby certify that before the execution of this, my last will and testament, I had advice and counsel in relation thereto from someone not under salary from Commerce Trust Company, who may become executor hereunder.*'' (Italics ours.)

A full copy of this will also appear in petitioner's printed record (109-10).

The Petitioner has not been denied due process. She has not only had her day in court but her months and years.

Judge Albert M. Clark, of whose lengthy service on the bench of the Missouri Supreme Court this Court will take judicial notice, after an examination of many of the cases above referred to made this well-justified pronouncement in his opinion in the case of *Moffett* v. *Commerce Trust Company*, 354 Mo. 1098, when, l. c. 1130 (C80), he said (emphasis ours):

> [8] Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803 and the "due process" and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. [*Moffett* v. *Moffett*, 131 Kan. 582, 292 P. 947; *Clark* v. *Andrews*, 126 Kan. 23, 13 P. (2d) 294; *Clark* v. *Moffett*, 136 Kan. 711, 18 P. (2d) 555, 290 U. S. 602; *Moffett* v. *Robbins*, 14 Fed. Supp. 602; *Moffett* v. *Robbins*, 81 Fed. (2d) 431, 298 U. S. 675.] *Appellants have not been denied due process. They have not only had their day in court, but their months and years.*

Under the Missouri decisions Judge Clark had the right to take judicial notice of prior decisions of Missouri Supreme Court in related cases.

The records in the instant case show that Judge Reeves of the lower court had before him the opinions in many other cases dealing with the Moffett litigation including, of course, the opinion from which the above quotation is made.

Statement of Respondent Commerce Trust Company concerning the pleadings in the instant case and the issues raised thereby and involved therein.

The original complaint in the instant case was filed in the lower court on February 7, 1947. Petitioner thereafter filed an amended complaint, thus exercising her right to have one free amendment. This amended complaint, consisting of 92 pages, was filed on March 18, 1947, and appears in full on pages (C153-245).

Against the amended complaint respondent Commerce Trust Company filed a motion to dismiss on various grounds. This motion was sustained on December 11, 1947, and was accompanied by the written opinion appearing in 75 Fed. Supp. 303 (769-775).

On account of the many questions raised in this case, we suggest that this Court read this opinion at this point, as it is most exhaustive and complete and fairly meets the contentions made by the petitioner, and discusses extensively the Civil Rights Statutes. In the order dismissing this complaint (1), Judge Reeves said:

> "• • • and it appearing that appellant's amended complaint does not *state a cause of action or one cognizable in this Court* and that her complaint should be dismissed." (Italics ours.) (Here follows the Order of Dismissal (2).)

On December 15, 1947, on application of petitioner the order of dismissal was amended so as to provide that same was without prejudice to the right of petitioner to file amended complaint. The second amended complaint was filed on February 7, 1948, and was later amended by interlineations. Said amended complaint had attached thereto certain exhibits therein referred to and made a part thereof, lettered respectively Exhibit "A" to Exhibit "K," both inclusive, and respectively set forth in full in appellant's printed record.

Exhibit "I" (70) sets forth the *per curiam* opinion of the Supreme Court of the United States, dismissing the appeal from the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company,* reported in 354 Mo. 1098.

The second amended complaint contained allegations referring to said Exhibits "A" to "K," respectively, and made same and each of same a part of petitioner's second amended complaint.

In said Exhibit "E" (45) petitioner refers specifically to the following cases mentioned on the following pages of her printed record, respectively: (44) *Moffett* v. *Moffett et al.,* 131 Kan. 582; (45) *Clark* v. *Moffett,* 136 Kan. 711; (47) *Clark, Administratrix et al.* v. *Moffett et al.,* 290 U. S. 642, 54 Sup. Ct. 61, 78 L. Ed. 558. The last cases named therein are the cases of *Clark* v. *Moffett,* 136 Kan. 711 (47), *Moffett* v. *Robbins,* 14 F. Supp. 602, and 81 F. 2d 431 (C47). In Exhibit "E" the foregoing cases are also mentioned on pages (C39-40).

In petitioner's second amended complaint, on the pages of her record hereinafter set forth, petitioner refers to the following cases:

(1) Paragraph 26 (15, 16). From other recitals it is manifest that this recital means *Zombro* v. *Moffett,* 44 S. W. 2d 149.

(2) Paragraphs 29, 30, 31, 32 and 33 (16, 17, 18). These paragraphs refer to the litigation which has been described by the parties as "the Comanche suit."

Paragraph 32 (18). This paragraph in its entirety should be read by the Court because among other things it not only charges the Judge of the District Court of Comanche County, but also the Judges of the Supreme Court of Kansas, with intentionally and purposefully having denied Thomas S. Moffett equal protection of the law.

Our Exhibit 17 (C261, 262) shows that the Supreme Court opinion in this case was published in 131 Kan. 546, 292 Pac. 942. We have reproduced in our record in photostatic form the full text of this opinion, including syllabi (C263-273). It will be noted therefrom that the District Judge against whom charges of wrongdoing were made was Hon. Karl Miller and not Judge Hay.

(3) Paragraph 39 (21, 22). This shows that petitioner, as the then plaintiff, appealed to the Supreme Court of Kansas and that court affirmed the judgment of the lower court and that "plaintiff petitioned for certiorari in the Supreme Court of the United States, which petition was denied." This manifestly refers to 131 Kan. 546 and 136 Kan. 711.

(4) Paragraph 48 (26, 27) alleges that the special Probate Judge entered an order on February 7, 1929, ordering Thomas S. Moffett to convey said land (the Hymer ranch) to Commerce Trust Company and that said Special Judge in making said order intentionally and purposefully discriminated against Thomas S. Moffett and in favor of the defendants. It is further alleged therein that the defendants appeared in the Probate Court of Jackson County, Missouri, and caused said Court to make an order directing Commerce Trust Company to sell and convey said land.

Commerce Trust Company's Exhibit 60 (689-710) shows all proceedings in the Probate Court with reference to the sale of the Hymer ranch and that the order of sale (C708) was made by Hon. M. J. Henderson, who was the regular or elected Judge of said court (of which fact your court will take judicial notice).

(5) Paragraph 52 (29, 30). This expressly refers to the Missouri damage suit (reported in 354 Mo. 1098) and contains the following recitals:

"On Saturday, December 30, 1944, said state action was dismissed by said Circuit Court on the ground of misjoinder of parties plaintiff. On appeal to the Supreme Court of Missouri said judgment was affirmed."

On page 30 it is recited, "Plaintiff's appeal to the Supreme Court of the United States from said judgment of affirmance was dismissed." (This clearly identifies the case mentioned as being the case of *Louise McGrew Moffett, etc.*, v. *Commerce Trust Company et al.*, 354 Mo. 1098, 193 S. W. 2d 588.)

(6) Paragraph 49 (27, 28). This refers to the order of the Wyandotte County, Kansas, Probate Court entered in 1931 authorizing the administratrix of the Thomas S. Moffett estate in Kansas to take charge of the partnership estates of Moffett Brothers and Andrews, and Andrews, Lewis and Moffett, and alleges that after same was done and after said Probate Court lost jurisdiction so to do, it entered an order on its records revoking the appointment of said administratrix of said partnership estates. These allegations clearly refer to orders of the Probate Court of Wyandotte County revoking the authority of Grace Torrance Clark to act as administratrix and appointing L. B. Andrews in her stead. Mrs. Clark appealed from these orders, and the District Court of Wyandotte County reversed the orders of the Probate Court. Thereupon, Andrews and others appealed, and the Supreme Court in 136 Kan. 23, 13 Pac. 2d 294, reversed the judgment of the District Court of Wyandotte County, thereby affirming the original orders of the Probate Court.

Our Exhibit 16 (C 249, 250) shows that the Supreme Court opinion in this case was published in 136 Kan. 23 and 13 Pac. 2d 294. We have reproduced in our Record in photostatic form the full text of this opinion, including

syllabi (C 250-251). This case was mentioned by Judge Clark on page 1130 (C 84) of the opinion of the Missouri Supreme Court in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, copy of which opinion, with points and authorities, appears in Commerce Trust Company's printed record beginning on page 48.

The aforementioned cases of *Moffett* v. *Moffett,* 131 Kan. 546, 292 Pac. 942, and *Zombro* v. *Moffett* (Mo.), 44 S. W. 2d 149, are specifically referred to on page 713 in the case of *Clark et al.* v. *Moffett et al.,* 136 Kan. 711; and the case of *Moffett* v. *Moffett,* 131 Kan. 582, 292 Pac. 947, is referred to on the same page.

In response to this complaint defendant Commerce Trust Company filed on March 20, 1948, a document entitled: "Consolidated Motions of Separately Moving Defendant Commerce Trust Company," consisting of two parts, Part I of which is set forth on pages 73 to 76 of petitioner's record. Part II thereof is omitted entirely in petitioner's record. Said Part II is a motion to make said second amended complaint more definite and certain in 46 particulars, numbered respectively from Item 1 to Item 46, both inclusive, and consists of 47 pages, exclusive of exhibits.

On April 2, 1948, defendant Commerce Trust Company filed a document entitled: "Amendments to Defendant Commerce Trust Company's Consolidated Motions, Filed March 20, 1948, Entitled: 'Consolidated Motions of Separately Moving Defendant Commerce Trust Company'."

On page 76 of petitioner's printed record she refers to this document and makes the following explanation for incorporating only certain parts thereof in her printed record:

> (fol. 59) "On April 2, 1948, Commerce Trust Company filed 'Amendments to Defendant Commerce Trust Company's Consolidated Motions,' *which*

amendments, as far as they refer to the motion to dismiss on the ground that the second amended complaint does not state a claim on which relief can be granted, are in words and figures as follows:" (Italics ours.)

Petitioner in her printed record then incorporated the introductory paragraph of such amendments (76-77), consisting of 13 lines. The only part of Part III thereof (other than the caption) incorporated in her record, is set forth on pages 77 and 78 thereof and consists of 24 lines. The only part of Part IV thereof (other than the caption) incorporated in her record is paragraph (b) thereof, consisting of 8 lines (78).

On account of petitioner's expurgations we have incorporated said amendments in full on pages 7 to 109, both inclusive, in our printed record. This includes exhibits referred to in, and forming a part of, said Part III, which was a motion to dismiss for failure to state a claim. In order that the Court may appreciate the extent to which petitioner has failed to incorporate in her record the pertinent parts of Part III (being said motion to dismiss for failure to state a claim) we now refer to said Part III in our printed record.

Petitioner, in her printed record, has made many omissions from Part III and Part IV of these Amendments, the nature and extent of some of which are mentioned in the printed record of respondent Commerce Trust Company on page (C7).

So that, what actually appears in Part III of our motion (being the part thereof in which we asked that the amended complaint be dismissed for failure to state a claim), will be readily apparent to this Court, we have reproduced all the pertinent parts of said Part III as Item One in our Appendix to this brief.

As regards Part IV (C 17) petitioner reproduces the

caption thereof, but omits the motion appearing as the initial clause therein, reading as follows: "This defendant separately moves the Court," which motion relates to four subdivisions respectively designated (1), (2), (3) and (4). As regards subdivision (1), she omits all that appears in clause (a) thereof, reproduces what appears in clause (b) thereof, and entirely omits what appears in clause (c) thereof. Said omitted clause (c) is in words and figures as follows:

> "(c) That the court render summary judgment in favor of defendant Commerce Trust Company dismissing plaintiff's action on the ground that there is no genuine issue as to any material facts and that this defendant is entitled to a judgment as a matter of law; or in the alternative,"

She entirely omits the other three alternative motions set forth in subdivisions (2), (3) and (4) of said Part IV, same reading as follows:

> "; or in the alternative, (2) that the court dismiss plaintiff's Second Amended Complaint pursuant to and on the grounds set forth in Part III hereof; or in the alternative, (3) that the court dismiss said second amended complaint pursuant to and on the grounds set forth in Part I of this defendant's Consolidated Motions; or in the alternative, (4) that the court sustain each and all of the various motions contained in Part II of this defendant's consolidated motions and as regards each and every Item thereof."

Said Part III was a separate and distinct motion expressly praying that said Second Amended Complaint be dismissed for the failure to state a claim or claims against this defendant upon which relief can be granted.

We desire to call particular attention to clause (b) of Part III of our Amendments (C 9). This clause was incorporated herein on account of petitioner's disregard of the order made by the lower court on December 11, 1947.

We also bring to the attention of the Court certain of the recitals appearing in Part I of our consolidated motions filed March 20, 1948, directed against the second amended complaint. They are set forth on page 75 of petitioner's record, and are preceded by figures IV, V and VI, respectively.

Petitioner's first document filed subsequent to the filing of our Consolidated Motions and Amendments thereto, was filed on May 24, 1948, and was entitled, "Plaintiff's Counter-Motion to Defendants' Motions." This motion appears in petitioner's record, pages 224 to 233. There (225) the following prayer appeared: "Plaintiff Moves: 1st For an Order Denying All of Defendants' Motions." Therein petitioner also asks for an order compelling defendants to pay plaintiff her reasonable expenses, including reasonable attorneys fees, on the ground that defendants' motions were made in bad faith and for the purpose of delay. Said counter-motion concludes with (233) a prayer reading in part as follows:

> "WHEREFORE, Plaintiff prays that this motion of plaintiff be sustained by *denying defendants' motions,* * * *" (Italics ours.)

POINTS, AUTHORITIES AND ARGUMENT.

Explanatory.

(In the arrangement of the following parts of this brief we have first set forth under designations C-1, C-2, C-3 and under like numbered designations preceded by the letter "C" certain points which we deem it important to be considered at an early stage and have followed same by similar designated points making specific response to specific contentions of the petitioner, and

have incorporated at the end in regular sequence certain additional points and authorities largely taken from our brief in the Court of Appeals, which are stated tersely.

In instances where the argument is lengthy we have placed the argument in a subdivision captioned "Argument" and where the discussion is not lengthy we have indicated that same will not appear in the argument.)

C-1.

Point C-1 appears under the heading "C-1" in our Argument.

C-2.

(The Howard Fee Case)

Point C-2 appears under the heading "C-2" in our Argument.

C-3.

Point C-3 appears under the heading "C-3" in our Argument.

C-4.

In many places in her complaint and in her briefs filed in the lower court and in this Court petitioner has loosely used the words "void" and "without jurisdiction" or equivalent words when the context shows that she is merely complaining on account of some allegedly erroneous decisions.

> *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, l. c. 415-416, 68 L. Ed. 362 (opinion by Judge Van Deventer).

In this opinion Judge Van Deventer made very succinct and concise comments, which we think are pertinent to many of the questions which have been raised by petitioner in her briefs and in her second amended complaint. Therein on pages 415-416 he said:

> "If the constitutional questions stated in the bill actually arose in the case, it was the province and

duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. (Citing many cases.)

"*Some parts of the bill speak of the judgment as given without jurisdiction and absolutely void; but this is merely mistaken characterization. A reading of the entire bill shows indubitably that there was full jurisdiction in the state courts, and that the bill, at best, is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction.*" (Italics ours.)

(This Point does not appear in Argument.)

C-5.

(This section of our brief is responsive to Section V (pages 31-43) of petitioner's brief.)

Commerce Trust Company, in its respective representative capacities, was not an officer of the State of Missouri, was not an agent of the State of Missouri, and was not an agency of the State of Missouri.

In *Stevens* v. *Larwill,* 110 M. A. 140, l. c. 157, Judge Jackson L. Smith, a veteran Missouri justice, said:

> "It is contended, however, that an administrator is a State officer and as such is included within the meaning of section 12, article 8, of the constitution of this State which declares that, 'no person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States and who shall have resided in this State one year next preceding his election or appointment.' An administrator belongs to the same class of officers as curators, guardians, receivers, referees, and the like,

whose duties are private and concern private interests, and are in no sense of the term public. He is invested with no portion of the soverign functions of the State to be exercised by him for the benefit of the public, and is therefore not an officer of this State within the meaning of the constitutional provision just quoted. We have been referred to no case in which it has been held that an administrator or any one of that class of subordinate officers to which he belongs is a public officer within the meaning of the said constitutional provision. The statute—section 10, Revised Statutes—does not require that an administrator shall have resided one whole year within this State, but only prohibits the appointment of a non-resident. It has been held in New York—71 N. Y. 238—that a referee is not a public officer within the meaning of a provision of the constitution of that State prohibiting judges from exercising any power of appointment to a public office.

"Mechen on Public Officers, section 1, states that, 'a public office is the right, authority and duty duly created and conferred by law, by which for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the functions of government, to be exercised by him for the benefit of the public. As here used, the word "office" is to be distinguished from its application to such positions as are at most *quasi* public only, as the charge of an executor, administrator, or guardian, and from the offices of a private corporation.' Accordingly, we do not think the respondent's letters should be revoked on the ground of non-residence of this State."

The court, in *Wilcox* v. *Horan*, 10th Cir., 178 F. 2d 162, l. c. 165, said:

"• • • The assertion that a guardian or custodian of the person of an incompetent, appointed by a county court having jurisdiction of such matters, is

an agent or representative of the state is not supported by any authority. While we very much doubt that respondent is a state officer as that term is ordinarily understood, we feel quite certain that her acts are not to be deemed 'state action' within the contemplation of the 14th Amendment. *Snowden* v. *Hughes, supra.*"

(This Point does not appear in Argument.)

C-6.

At all times involved in the instant controversy there was in full force and effect a Kansas statute which authorized foreign executors and administrators to sue and be sued in any court in that state.

Section 22-1308 was in words and figures as follows:

> "22-1308. *Suit by or against foreign representative.* An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may sue or be sued. (G. S. 1868, ch. 37, §203; Oct. 31; R. S., 1923, §22-1308.)"

The Supreme Court of Kansas passed squarely on the validity of this statute as applied to appellee Commerce Trust Company in the case of *Clark* v. *Moffett,* 136 Kan. 711, l. c. 720, *wherein in response to the appellants' challenge of its validity the court said:*

> "It is argued that even if the appointment of the Commerce Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state."

This statute was passed in 1868.

In 1939 the Kansas legislature enacted what is generally understood to be a model Probate Code (See Laws 1939,

C. H. 180, Section 59-1708, July 1, 1939) wherein Section 22-1308 was re-enacted in the exact language thereof except that the words "a fiduciary" were substituted for the words "an executor or administrator" thus making it possible for all foreign fiduciaries of all types to sue and be sued in the State of Kansas.

In *Moore* v. *Petty*, 135 F. 668, the 8th Circuit, speaking through Judge Hook, in the year 1905, said, l. c. 672:

> "• • • The general rule undoubtedly is that an executor or administrator in his representative capacity cannot maintain an action in the courts of any sovereignty other than that under whose laws he was appointed and qualified, without obtaining an ancillary grant of letters in the state where the action is brought, *unless the right so to do is conferred upon him by the law of the forum.*" (Italics ours.)

(This Point does not appear in Argument.)

C-7.

Petitioner has throughout failed to distinguish the difference between an action for a criminal conspiracy and a civil case charging conspiracy.

Judge Reeves pointed out this distinction in his first opinion and also in his second opinion in the instant case, 87 Fed. Supp. 438, l. c. 442, when he said:

> "There exists no civil action for a conspiracy, and particularly is this true in the national courts. An action may lie for damages suffered by reason of torts committed pursuant to a conspiracy but no action for damages lies for the conspiracy alone. *Sidney Morris & Co.* v. *National Ass'n of Stationers*, 40 F. 2d 620.
>
> 'The gist of such action is • • • the conspiracy, but it is the damages for which the wrongdoer and all who conspire with him are liable.' " Id.

In *Brictson* v. *Woodrough*, 164 Fed. (2d) 107 (10th Circuit), on pages 109-10, the Court said:

"(4) The gist of a civil action for conspiracy is the act or acts committed in pursuance thereof, the damage, not the conspiracy or the combination. Unless injury has resulted from something done in furtherance of the conspiracy by one or more of the conspirators, a civil action will not lie. The combination may be of no consequence except as it bears upon the rules of evidence or the persons liable."

(Does not appear in Argument.)

C-8.

Petitioner's suit is in the nature of a glorified action for malicious prosecution.

She includes in one complaint many alleged causes of action, many of which are based on alleged common law and statutory grounds and, even if well founded, are in no event redressible in a Federal Court in a non-diversity action. As regards the alleged claims on account of the pending suits the case of *Higgins* v. *Realty & Inv. Co.*, 335 Mo. 1010, l. c. 1025, correctly states the universal rule, that no action for malicious prosecution can be maintained until a termination in favor of the parties claiming damages by reason thereof, where it said:

> "In a malicious prosecution suit the necessary elements for plaintiff to establish are: (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its *termination in favor of the present plaintiff;* (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage to plaintiff by reason thereof."

(Does not appear in Argument.)

C-9.

For the purpose of avoiding duplication and repetition, we hereby adopt that part of the brief of Respondents Weede appearing in Point I of their Argument, under the caption entitled: "Res Judicata." We also adopt their Point II.

(Does not appear in Argument.)

Additional Points to be designated C-10, C-11, C-12, and so on, will appear under headings C-10, C-11, C-12, and so on, in our Argument in the latter part of this brief.

STATEMENT OF ADDITIONAL POINTS AND AUTHORITIES.

POINT 1.

The petitioner does not allege or claim jurisdiction on the ground of diversity of citizenship. Jurisdiction in the instant action does not exist on that ground. Petitioner at all times was a citizen of Missouri (6), and defendants Commerce Trust Company (C1, 2), B. C. Howard (C3, 4), and William H. Kopp (C4) were respectively at all times citizens of Missouri.

(This Point does not appear in Argument.)

POINT 2.

Petitioner invoked jurisdiction of the Federal court solely on the ground that the alleged action arose under certain provisions of the Federal Constitution and laws of the United States. (See appellant's record, pages 2, 3.) The lower court had jurisdiction to hear and sustain the motion to dismiss the second amended complaint for failure to state a cause of action (claim) upon which relief can be granted. Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action upon which petitioners could actually recover.

Bell v. *Hood*, 337 U. S. 678, 90 L. Ed. 939.

(This Point does not appear in Argument.)

POINT 6.

The doctrine contended for by petitioner's counsel if sanctioned, and approved by the Court, would result in the destruction of time-honored precedents and be revolutionary in its effect, because, as applied to the facts in the instant case, it would permit a litigant—after the adverse decision of the trial court, after a judgment of affirmance by the court of last resort of the state, and after denial of a writ of certiorari by the Supreme Court of the United States; and after filing a suit to restrain the enforcement of said judgment in the Federal District Court, and after the adverse decision of that court and after the decision of the District Court had been affirmed by the United States Circuit Court of Appeals, and after the Supreme Court of the United States had refused certiorari, and after the petitioner in one instance had filed in the Supreme Court of the United States all of the necessary and requisite papers to review by appeal the decision of the Missouri Supreme Court and the United States Supreme Court had dismissed the appeal and had later denied a lengthy petition for a rehearing—to set up and raise again the very questions decided against such litigant, and set the Federal courts up as an arbiter of the correctness of every state decision.

(This Point does not appear in Argument.)

POINT 7.

Petitioner's second amended complaint on its face shows that she attempts to charge at least the following judges of wrongdoing: Judge Hay of the Harper County District Court, Judge Karl Miller of the Comanche County District Court, all of the judges of the Supreme Court of Kansas, all of the judges who sat as special judges of the Jackson County Probate Court and who took any action concerning the Moffett litigation, and Judge M. J. Henderson, the elected Probate Judge of Jackson County, who entered the order for the sale of the Hymer ranch. In the application (736) for an injunction to stay the prosecution of Cause 339,134 filed in this Court and heard on March 4, 1950, on page 10 thereof (743) petitioner alleges that on four occasions between August 23, 1943, and December 20, 1949, the judges of the

Circuit Court of Jackson County intentionally and purposefully discriminated against her. In the brief filed by petitioner with Judge Reeves on April 30, 1949 (C955), petitioner insinuates and intimates that the full bench of the Supreme Court of Kansas, and of the Circuit Court of Appeals for the Tenth Circuit, and Federal Judge Hopkins were all participants in the claimed conspiracy along with Kansas District Judge Hay. The formula "purposefully and intentionally" (borrowed from one of the cases cited by her) is used throughout this complaint. It is a mere conclusion. It is not followed by any recital of facts, and it is evident from the entire Record that these allegations are based on the sole ground that the respective judges rendered decisions which petitioner claims were erroneous.

(This Point does not appear in Argument.)

POINT 10.

The often quoted opinions of Judge Lewis of this circuit in *Coleman v. Apple*, 298 F. 718, 720, 721, and of Judge Kimbrough Stone of this circuit in *Owens v. Battenfield*, 33 F. 2d 753, fully sustain our contention that erroneous decision of the state court does not violate any federal constitutional right.

(This Point does not appear in Argument.)

POINT 11.

The order made by Judge Reeves is fully sustained by his comprehensive opinions discussing all of the contentions raised by petitioner. His orders are abundantly upheld by the recent excellent opinion of Judge Collett in *Gibson v. Reynolds*, 172 F. 2d 95, which affirms and sustains the opinion of Judge Miller of Arkansas reported in 77 F. Supp. 629. These opinions are squarely in point. This order is likewise supported by Judge Huxman's opinion in *Polhemus v. American Medical Association*, 145 F. 2d 357.

(This Point does not appear in Argument.)

POINT 12.

In Missouri the appointment of an administrator or executor is not subject to collateral attack.

McWilliams v. *Armstrong,* 320 Mo. 1122, l. c. 1127, 9 S. W. 2d 600, and the numerous cases therein cited.

POINT 13.

In *Brictson v. Woodrough,* 164 F. 2d 107 (the Court will recall that in this case the judges of the 10th Circuit were specially assigned to hear this case as judges of the 8th Circuit) at l. c. 109, Judge Phillips expressly held:

"• • • where a judge has jurisdiction over the subject matter and the person, he is not liable civilly for acts done in the exercise of his judicial function, even though he acts erroneously, illegally, or irregularly, or even corruptly."

See also *Gregoire* v. *Biddle,* 177 Fed. (2d) 579.

POINT 14.

The decisions of federal district and circuit courts of Kansas are binding upon the petitioner and are not subject to collateral attack.

Bernhard v. *Trust & Savings Assn.,* 122 Pac. 2d 892, l. c. 894-895.
Brobston v. *Darby,* 290 Pac. 331, 54 A. L. R. l. c. 1290.
Bruszewski v. *United States,* 181 F. 2d 419.
Caterpillar Tractor Co. v. *International Harvester Co.,* 32 F. Supp. 304, l. c. 306.
Dillard v. *McKnight,* 209 Pac. 2d 387.
General Chemical Co. v. *Standard Wholesale Corp.,* 101 F. 2d 178, l. c. 181.
Taylor v. *Sartorious,* 130 M. A. 23, l. c. 39, 108 S. W. 1089.

(This Point does not appear in Argument.)

POINT 15.

Under the laws of Oklahoma, upon the death of his three co-partners in the partnership of Moffett Brothers Cattle, Land and Lumber Company, Renwick J. Moffett, then sole surviving partner, succeeded to the title to all the partnership property, whether real or personal, in trust for the purpose of settling, liquidating and winding up of the partnership, and had the right to sell the same without any proceedings in court.

Clary v. *Brown,* 190 Okla. 19, 109 Pac. 2d 830.
Neustadt v. *Daube,* 190 Okla. 614, 126 Pac. 2d 999.
Oklahoma Statutes, 1941, Title 58, Sec. 255.
Oklahoma Statutes, 1941, Title 54, Sec. 54.
Taliaferro v. *Reirdon,* 191 Okla. 43, 126 Pac. 2d 696.

(This Point does not appear in Argument.)

ARGUMENT.

C-1.

The decision of the Kansas Supreme Court in the case of *Moffett v. Moffett,* 131 Kan. 582, 292 Pac. 947, clearly established that the Harper County District Court had jurisdiction over the subject matter. The pronouncements therein became the law of the case.

This case expressly upheld the right of Commerce Trust Company to intervene in its respective representative capacities.

This case is also important and very pertinent in that it deals exhaustively with the question of the nature and characteristics of partnership real estate.

The appeal from the decision in the lower court culminating in the opinion in 131 Kan. 582 involved only two

questions: first, whether or not the court committed error in overruling appellant's demurrer to the answer filed by defendant Helen Moffett (now Weede) in the nature of a cross-action praying that before the land be partitioned an accounting be had to determine her share or interest, as well as that of the plaintiff and the other defendants, in the property sought to be partitioned; and second, whether or not the court committed error in permitting Commerce Trust Company to intervene in its two capacities. The Supreme Court decided both of these questions adversely to the contentions of appellant and held in a lengthy opinion that under the laws of Kansas the court had jurisdiction to take an accounting, and further held, l. c. 588:

> "• • • But it is a principle of law, applicable to courts of equity, that such a court, having assumed jurisdiction of the subject matter, will reach out and draw into its consideration and its determination the entire subject matter, and bring before it all the parties interested therein, in order that a complete and effectual final decree, adjusting the rights of all parties, may be entered and enforced."

As regards Commerce Trust Company, this appeal related solely as to its right to intervene in this proceeding at that stage. The appellant raised this contention in the lower court, and the appellate court disposed of that question by the use of the following language, l. c. 588:

> "It is unnecessary to say much about the applications to intervene. It is clear from the allegations in these applications and from the answer of Helen Moffett, which are taken as true for the purpose of this appeal, that it will be necessary, to a substantial extent, for the trial court to treat the real property of the partnership as personalty, and to whatever extent that is necessary to be done the intervener, in its respective capacities, is a proper party to the action. *Appellant contends that the Commerce Trust Com-*

pany is intervening in two capacities which are in conflict. But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties." (Italics ours.)

It is interesting to note that Thomas S. Moffett did not in this case, either in the lower court or appellate court, challenge the validity or regularity of the appointment of the Commerce Trust Company to act in these capacities. The decision in this case became the *law of the case*. This principle is so well established that citation of authorities is unnecessary.

Judge John C. Pollock, veteran Kansas jurist, who had had long service in the state and federal courts of Kansas, recognized this principle in his memorandum opinion handed down on April 20, 1931 (W262). Therein he further stated: "* * * The decision of the lower court was made by a court having jurisdiction to determine the question involved, and whether said order was right or wrong in law it was made by a court having jurisdiction to determine same, and hence not having been reviewed is the law of the case unless and until corrected on review by some court having the power to do so."

Petitioner's counsel has for almost twenty years ignored and failed to recognize this salutary and well-established principle so forcefully brought to his attention in 1931.

When the petitioner again challenged the right of the Commerce Trust Company to intervene the court very pertinently said in *Clark* v. *Moffett*, 136 Kan. 711, l. c. 720:

> "Appellants contend that the Commerce Trust Company is without capacity to represent the Moffett Brothers partnership in this action. When the case was in this court before, one of the points determined was that it was proper for the trial court to permit the Commerce Trust Company to intervene in this

action in its capacity as administrator of the partnership estate of Moffett Brothers. Ignoring the former determination of this question, appellants present two reasons in support of their contention. *First,* that the appointment was made by one who assumed to act as special judge, or judge pro tem, of the Probate Court of Jackson County, Missouri, who was not so chosen in accordance with the constitution and statutes of Missouri, therefore his order making the appointment is void. The trial court found that his selection was made in accordance with the constitutions and statutes of Missouri, as interpreted by the Supreme Court of that state. The finding appears to be sound. But, passing that, he was there acting as judge of the Probate Court and did make the appointment. No appeal has been taken from that order. The Commerce Trust Company has been acting under the appointment since December 28, 1928. He was at least a judge *de facto.* The regularity of his appointment, or his acts as judge, cannot be collaterally attacked in this proceeding. (*Briggs* v. *Voss,* 73 Kan. 418, 85 Pac. 571; *Keys* v. *Keys,* 83 Kan. 92, 109 Pac. 985.) *Second,* it is argued that even if the appointment of the Commerce Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state * * *."

The real estate involved in the Harper County Partition-Accounting suit (Cause No. 7374) belonged to the partnership estate of Moffett Brothers. The case mentioned in the caption dealt exhaustively on pages 585-587, with the difference between the so-called English Rule relating to partnership real estate and the American doctrine on the same question, and discussed these two rules in the light of the contentions of the respective parties to the litigation. After referring to the doctrine in America, on page 586, the court said (l. c. 587): "Our

own cases are in harmony with this view." Here the court next cites nine Kansas cases. On the same page, the court said: "The share or interest of the respective parties in such real property can be determined, of course, only by determining the status of the partnership and the obligations of each member to it and to each other."

The court next said: "Appellant contends that the court does not have power to make such an accounting in the partition action." After devoting considerable space to the discussion of this contention, the court, at the conclusion of its opinion (l. c. 588) said: "On the whole it seems quite clear that there should be such an accounting as is prayed for by the defendant and intervener in order to determine the respective interests of the parties in the land sought to be partitioned."

C-2.

(The Howard Fee Case)

Petitioner, in her petition and brief, again makes the unwarranted and untenable contention that the decision of the Supreme Court of Missouri in the Howard Fee Case (345 Mo. 741) rendered void the judgments of the Harper County District Court. The Missouri Supreme Court did not so decide or attempt to so decide.

The Howard Fee Case, being an appeal from the Probate Court, the jurisdiction of the Supreme Court was purely derivative, and even if the Supreme Court had attempted to so decide (which it did not), it had no jurisdiction to determine any matter other than that which was directly involved in the Probate Court, to-wit: The allowance of an additional fee to Mr. Howard, and the approval of compensation already paid to him.

In Missouri, appeals from the Probate Court to the Circuit Court are tried *de novo,* and the Circuit Court and the other appellate courts have no jurisdiction, or power to decide or determine any question not directly involved in the Probate Court.

The leading case in Missouri sustaining the foregoing, is *State ex rel. Burns* v. *Woolfolk* (*Banc*), 303 Mo. 589, 262 S. W. 346. This case involves a controversy relative to the removal by the Probate Court of an administrator, and it was claimed by relator that the Circuit Court had no jurisdiction to proceed in the matter of removing one Burns and appointing one Linder in his stead. In the Burns case, the court said:

> "Section 34, Article VI, of the Constitution of Missouri, gives the probate courts of the State exclusive original jurisdiction in all matters appertaining to probate business, including the granting of letters of administration, the settling of accounts of executors and administrators, etc. The statutes, Sections 1, 3, 4, 48, Revised Statutes, 1919, relating to the granting of letters of administration approving bonds, accounting, etc., vest probate courts alone with original jurisdiction of such matters. Under Article XII, Chapter I, Revised Statutes, 1919, circuit courts have only appellate jurisdiction. *The Circuit Court here had jurisdiction to consider only matters considered, adjudged and appealed from in the Probate Court. The Court of Appeals in reversing the judgment could order the Circuit Court to adjudge only those questions.* After the Circuit Court had rendered judgment in the matter appealed to it from the Probate Court, it was the duty of the clerk of the Circuit Court to certify a transcript of the record of its proceedings to the Probate Court. (Sec. 291, R. S., 1919)." (Italics ours.)

This pronouncement is abundantly supported by the following cases: *Smith* v. *St. Louis Union Trust Co.*, 340 Mo. 979, 983, 104 S. W. 2d 341, 343. *In re Harr & Harr's Estate*, 224 M. A. 6, 16, 22 S. W. 2d 209, 214. In re *Mills' Estate*, 349 Mo. 611, 162 S. W. 2d 807. *Branson* v. *Branson*, 102 Mo. l. c. 620. See also, Section 291, R. S. Mo. 1939 (R.

S. Mo., 1929, Sec. 292) (1949 R. S. Mo., 467.090) reading as follows:

> "Sec. 291. *Circuit or other appellate court to hear de novo.*—Upon the filing such transcript and papers in the office of the clerk of the circuit court, or other court having appellate jurisdiction in the county, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the probate court. (R. S. 1929, 292.)"

In this connection it is to be borne in mind that the Probate Court had before it for consideration two questions, and two questions only: First, whether or not Claimant Howard, who had already received $1,300.00 on account of legal services, was entitled to any additional compensation; and, second, whether or not the Probate Court should approve the payment of the $1,300.00 already made to him. The Probate Court made claimant an additional allowance and approved this prior payment. The Circuit Court approved the prior payment and increased Mr. Howard's allowance from $7,770.00 to $11,500.00. The Supreme Court approved the payment of $1,300.00 and denied Mr. Howard any additional compensation. Throughout, Louise McGrew Moffett individually and as executrix of the estate of Thomas S. Moffett, her deceased husband, resisted the allowance of any additional fee to claimant, and endeavored to prevent the approval of the payment of $1,300.00.

In an early part of the opinion in 345 Mo. 741 (l. c. 745), the court said: "The Commerce Trust Company was the administrator *de bonis non* of the estate, or so considered for the purpose of this opinion." In the opinion, the court next refers to the nature of Mr. Howard's claim (l. c. 745). The court next says:

"The record covers nearly 1,400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, *but the conclusion we have reached makes it unnecessary to consider but one of these grounds,* viz., that, under the facts, claimant is not entitled to any fee from the Moffett Brothers estate." (Italics ours.)

On page 746, the court said:

"August 17, 1928, Helen Moffett, John's widow, commenced proceedings in the probate court to remove Thomas S. as executor of the John Moffett estate on the grounds that the interests of the John Moffett estate and the Moffett Brothers estate were conflicting. November 28, 1928, Thomas S. was removed as executor of the John Moffett estate, and the Commerce Trust Company (Kansas City) was appointed administrator *de bonis non* of the estate. December 22, 1928, the trust company, proceeding under Section 86, Revised Statutes 1929 (Mo. Stat. Ann., sec. 86, p. 52), claims to have become administrator of Moffett Brothers estate in Missouri. It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, *but, as stated, we shall consider only one question.*" (Italics ours.)

In this opinion, the court refers to some of the cases dealing with prior litigation in the Kansas courts, to which reference has been made in another section of our brief. It is apparent from reading this case that the only questions decided were whether or not Mr. Howard was entitled to any additional fee, and whether or not the prior payment by Commerce Trust Company should be approved. It is too evident that the court denied Mr. Howard any additional compensation solely on account of the fact that he represented conflicting interests.

On page 751, the court said:

> "Perhaps claimant rendered services for the Moffett Brothers estate of the value of $1,300 when he was not representing conflicting interests. That is not made clear, hence in the situation, we do not think that we should disturb the approval of the payment of the $1,300.
>
> The judgment should be reversed and the cause remanded with directions to enter a judgment denying claimant any additional fee, but approving the payment of the $1,300, and it is so ordered."

The opinion in the Howard Fee Case was handed down in Division 1 of the Missouri Supreme Court on March 6, 1940. Almost six years later the same division of the Supreme Court of Missouri, on February 11, 1946, handed down its opinion in the case of *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. 2d 588. This Court will take judicial notice that on the last-named date the court consisted of the same members as on the date of the rendition of the opinion in the Howard Fee Case, except that Commissioner Laurence Hyde had in the meantime been appointed judge in lieu of another judge who had resigned. In this case the petitioner (then appellant) raised the identical question she is now raising, to the effect that the decision in the Howard Fee Case had the effect of rendering void the decisions of the Kansas District Court. In answer to this contention, the court, speaking through Judge Clark, said (l. c. 1129):

> "(6) *In Re Moffett Bros. Partnership Estate,* 345 Mo. 741, 137 S. W. (2d) 507, grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as administrator of the partnership estate, Mrs. Moffett, individually and as executor of her husband's estate, resisted the allowance in the probate, circuit and supreme courts. No point was presented or decided as to Mrs. Moffett's right to

> appear in both capacities. *The only point decided was that Howard was not entitled to an additional fee.* • • • (Italics ours.)

Thence, when petitioner's counsel raised this contention before the same court which tried the Howard Fee Case, that court, with full knowledge of its record and its opinion in the Howard Fee Case, positively stated: *"The only point decided was that Howard was not entitled to an additional fee."* (Italics ours.)

From the foregoing it abundantly appears that in the Howard Fee Case the Missouri Supreme Court emphatically twice said that it would consider only one question. Petitioner's counsel, apparently not believing that the Supreme Court meant what it said in its opinion, again raised this question, and the court positively said, in response to this contention: "The only point decided was that Howard was not entitled to an additional fee."

Eminent Robert F. Walker of the Supreme Court of Missouri, in the case of *Duvall* v. *Duvall,* 316 Mo. 626 (l. c. 635), 291 S. W. 48, reviewing a case where the same situation appeared, very appropriately said:

> *"To contend in the face of the plain and unmistakable words of this opinion that it was intended to include things not expressed therein, but on the contrary intentionally omitted therefrom, is to invoke the hitherto unheard of doctrine of judgment by implication."* (Italics ours.).

The Howard Fee Case, and what has been decided thereby, was the subject of a colloquy and much discussion, at an oral hearing before Judge Reeves on October 16, 1947. On the day following, petitioner's attorneys wrote a letter to Judge Reeves which appears (50-53), and mailed copy thereof to Respondent Howard. Petitioner's counsel, November 21, 1947, wrote another letter to Judge Reeves (see Exhibit "G," 54-65), and mailed copies

thereof to the attorneys for all of the then defendants, now respondents (65). To this letter the attorneys for this defendant, now respondent, Commerce Trust Company, on November 25, 1947, replied. Petitioner in her Exhibit "H," appearing on (66-69) quotes only excerpts from this letter from Commerce Trust Co. Our letter consisted of 16 typewritten pages and is reproduced in full, with end of page notations, in the printed record of Commerce Trust Company (C113 to 129). We refer to this letter in another part of our brief. At this time we earnestly request the Court to read what is said therein concerning the Howard Fee Case, and at this time, particularly, what appears on pages (C124 to 126) thereof. The second amended complaint was not filed in this cause until February 7, 1948. The petitioner's insistence that the decision in the Howard Fee Case renders void the judgments of the Kansas District Court results in an absurdity. In this anomalous situation, she bases her rights to recover in the instant action on the theory that these Kansas judgments were void. When confronted with the fact that the Kansas courts had full jurisdiction over the parties and the subject matter, and did render these decisions which withstood her assault in all of the courts, she now seeks to establish their alleged voidness on the sole ground that the effect of the Howard Fee Case was to reverse and set aside the decisions of the Kansas Supreme Court, and that inasmuch as the Howard Fee Case was later in point of time, its decision had the effect of overruling and setting aside the Kansas judgments. THE SUPREME COURT OF MISSOURI HAD NO JURISDICTION TO SO DECIDE, AND WE ASSERT WITH CONFIDENCE THAT THERE IS NO PREDICATE OR JUSTIFICATION OR WARRANT FOR PETITIONER'S CONTENTION THAT THE SUPREME COURT OF MISSOURI DID SO DECIDE.

C-3.

There was an Adversary Trial in the Harper County Suit.

This is, we think, clearly demonstrated by recitals appearing in the following opinions, all of which are expressly mentioned in the complaint.

In the opinion in the case of *Clark* v. *Moffett*, 136 Kan. 711, the following appears on page 714 (C29):

> This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs. Notwithstanding the extraordinary and wholly unnecessary bulk of the matter presented, we have endeavored to go through it carefully and painstakingly, and have done so as fully as our time would permit, and will treat and dispose of all the questions presented that have any semblance of merit.

In the same opinion on pages 715-16 (C30-31) the following appears:

> Appellants complain because the court received in evidence the summary of the books made by the accountants, "Commerce Trust Company Exhibit No. 8," and contend that it was incompetent and hearsay, and they contend that without it the evidence was insufficient. Naturally the original books were voluminous. They had been brought to the court in large boxes and trunks. They had been in possession of the plaintiffs, who had helped keep the books in recent years and were familiar with them. It was appropriate for a summary to be made by some one from them, collecting and properly setting down the entries or items bearing upon the controverted issues to be determined by the court. The trial court ad-

mitted this summary in evidence as informative only and not conclusive, and permitted the parties to refer to the original books as much as they desired and gave them ample time to do so. All other evidence relating to this indebtedness, the books and entries therein which either party offered, was received by the court. There is no contention now that this summary was not an appropriate and accurate one compiled from the books of the partnership. There was no error in receiving it in evidence.

There next appears on page 723 of said opinion (C38), the following:

Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit.

The following appears on page 723-724 (C38-39) of said opinion.

As before stated, the parties were in agreement as to the shares of the parties in the real property to be partitioned, except as they might be modified by an accounting. The accounting involved (1) the amount the Moffett Brothers Cattle, Land and Lumber Company owed Moffett Brothers; (2) the amount Thomas S. Moffett owed Moffett Brothers; and (3) the amount Moffett Brothers owed John Moffett. As to the first two of these three items, while the amounts had to be ascertained, they presented no serious controversy. The parties appear to be satisfied with the judgment concerning them. They are involved in this appeal incidentally only. The third item is the one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the

obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence.

The judgment is affirmed.

In the case of *Moffett* v. *Robbins,* 81 Fed. 2d 431 (C40), on page 437 (C46), the court said:

> [13] The Judgment is assailed on the further ground that there was no adversary trial. Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark, as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett. Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Torrance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. *In these circumstances, the mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves.* (Italics ours.)

In the Howard Fee case, 345 Mo. 741 (the case frequently cited and relied upon by petitioner and which petitioner incorporates in full with syllabi and court reporter's points and authorities as Exhibit "E" to her complaint (37-50) and which case petitioner sets forth in full without syllabi or reproduction of points and authorities on pages (692-701)), the following recital appears on page 749 (47):

> Appellant in her statement says that claimant "in one of his pleadings" in the partition-accounting suit, alleged that Mrs. Clark, as administratrix of Moffett Brothers estate in Kansas "was without power to make a defense on behalf of said partnership estate" in that suit. Claimant devotes forty pages of his brief to what is called an "analysis of appellants' statement of the case," and says that Mrs. Clark, as administratrix of the Moffett Brothers estate in Kansas, did appear for and represent said estate in the partition-accounting suit, and claimant goes on to say in this "analysis" that Mrs. Clark, as administratrix of Moffett Brothers partnership estate in Kansas, "paid thousands of dollars of Moffett Brothers partnership estate money out to attorneys, Martin J. O'Donnell and A. E. Watson, for helping her in" the partition-accounting suit. Which means, as we read, that attorneys O'Donnell and Watson, and not claimant, resisted the claim of the John Moffett estate against the Moffett Brothers estate in the partition-accounting suit.

In the case of *Moffett* v. *Robbins*, 81 F. 2d 431, on page l. c. 436 (C45), the court said:

> [10] It is contended that the judgment lacks validity because Grace Torrance Clark as administratrix of the estate of Moffett Bros. was not a party to the action.

After discussing this contention at considerable length, in which the facts were stated, the court said:

A court of equity should give meager heed to the belated contrary argument now advanced.

In the same opinion the court discussed the charge of fraud made by the appellant and disposed of same in a lengthy subdivision 8, 9, appearing on page 436, and held that these charges of fraud were not well founded.

Under rules promulgated by the Supreme Court of Kansas relating to procedure in district courts the Journal Entry of Judgment is prepared, submitted to the court and formally entered after the rendition of the judgment. Reference to these rules is made in another part of this brief.

C-10.

Response to subdivision II and subdivision III of petitioner's brief (pages 21-28), and to other parts thereof, which present petitioner's erroneous contention that the lower courts have erroneously held that she is not entitled to recover under the provisions of the Civil Rights Statutes.

Petitioner's brief in this case was filed on May 26, 1951, and served upon respondents early in June, which was prior to the handing down on June 4, 1951, of the memorable and belated opinion in the case of *Collins* v. *Hardyman,* No. 217, October term, 1950, which had been under submission since early in January of 1951. In this opinion your Court deals with many of the very questions which are urged by petitioner and decides same adversely to her contentions.

It is to be noted that your Court granted certiorari on account of the alleged conflict between the views of the Court of Appeals for the 8th Circuit as expressed in *Love* v. *Chandler,* 124 F. 785, and those of a majority of the Court of Appeals for the 9th Circuit as expressed in the *Hardyman* v. *Collins case,* 183 Fed. (2d) 308.

In the lower court Judge Reeves based his first opinion

as to this point on the case of *Love* v. *Chandler* and kindred cases (R773-774); and in the instant case the Court of Appeals expressly cited (Pro. 8) and relied upon the same case of *Love* v. *Chandler,* together with the cases of *Gregoire* v. *Biddle,* 2 Cir., 177 F. (2d) 579, 581-582; *Campo* v. *Niemeyer,* 7 Cir., 182 F. (2d) 115, 118; *Bottone* v. *Lindsley,* 10 Cir., 170 F. (2d) 705, 707; all of which cases had been cited in the brief of respondents filed in the Court of Appeals. The 8th Circuit Court of Appeals mentioned the *Hardyman* v. *Collins case,* 183 Fed. 308 (Pro. 8) and discussed and distinguished same on (Pro. 11 and 12), and on (Pro. 12) the court said:

> "• • • Here the complaint fails to show that plaintiff has suffered or will suffer the deprivation of a Federal right. The Federal Constitution does not guarantee a citizen against loss through fictitious or fraudulent litigation or through erroneous decisions of State courts on questions of State law nor, as we have seen, does it guarantee uniformity of decisions on the part of State courts nor protect the citizen against the invasion of private rights by private parties."

What the Eighth Circuit said is fully supported by the majority opinion recently rendered by your Court in the above-mentioned case of *Collins* v. *Hardyman.* The Court of Appeals for the 8th Circuit could have pointed out another distinguishing feature between the instant case and the *Hardyman* v. *Collins* case. The complaint there was predicated at least in part on the contention that under the facts in that case the plaintiffs there had been deprived of certain seminal and fundamental rights which were granted to them under certain specific provisions of the Federal Constitution not applicable to any situation in the instant case.

On account of these controversial matters having been finally settled by your Court we shall not refer further

or discuss any of the authorities cited in petitioner's brief in support of this contention except that we shall in a later section of our brief discuss the cases mentioned by petitioner as being in conflict with the opinion of the 8th Circuit in the instant case. Of course, what is said in these cases, if anything, which is contrary to the recent opinion of your Court, is no longer the law.

C-11.

Response to subdivision VIII of petitioner's brief (pages 47-49); and to other parts of said brief relating to the question of the jurisdiction or power of a court to render a particular judgment in a particular case.

This section of petitioner's brief deals with the question of the right of the court possessed with full jurisdiction over the parties and the subject matter to *render a particular judgment in a particular case.* Apparently it is included in petitioner's brief on account of her contention that the Kansas courts accorded Helen Moffett (now Weede) certain rights as his widow; whereas under the law she had no such rights by reason of the fact that John Moffett was a bachelor when he made his will and later died childless.

This contention is, we think, based on an erroneous construction of the Vanek case. We contend that the decision in the case of *Vanek* v. *Vanek,* 104 Kan. 624, decided the law exactly contrary to petitioner's contentions and that this is demonstrated by the 2nd syllabus of the opinion in that case, reading as follows:

> "2. Same—Construction of Statute. The provision of the statute that 'any married person having no children may devise one-half of his or her property to other persons than the husband or wife' (Gen. Statt., 1914, No. 11791), applies to the operation of wills made before marriage as well as after,"

and further, this is demonstrated by the recitals appear-

ing in subdivision 2 of that opinion near the end thereof. Petitioner cites, on page 49 of her brief the case of *Clevinger* v. *Figley,* 68 Kan., l. c. 407, and seems to place great reliance thereon. In the official reports, 68 Kan., this case begins on page 669. Petitioner's l. c. citation refers to page 707. **This case does not support petitioner's contention and is one of the leading authorities against her contention.**

In prior proceedings in the instant case this case has been cited several times by petitioner and we had occasion to make a careful review of same. It is apparent that the quotation reproduced by petitioner therefrom on page 49 does not in anywise refer to the facts in the Clevinger case but is an extract from the opinion in the case of *In re McNeil* appearing on page 366 of the same volume (68 Kan.), and was used by the court in the Clevinger case to make a distinction between the applicable principles to the facts in the Clevinger case and the applicable principles to the facts in the McNeil case. The case of *In re McNeil* was a habeas corpus proceeding. The facts show that McNeil was tried and convicted for an offense where the statutes provided for a jail sentence *or* a fine, and the court had sentenced him to jail *and also* imposed upon him *a money fine.* In the Clevinger case it was the contention of the losing parties that the judgment assailed was void because the land involved was a homestead and the judgment of the court authorizing the sale was violative of the express provisions of the statutes of Kansas. The syllabus in the Clevinger case is in words and figures as follows:

> "PRACTICE, DISTRICT COURT—Foreclosure—Joint Consent—Judgment Conclusive. In an action to foreclose a mortgage given by the owner of land jointly with the guardian of his insane wife, the District Court has jurisdiction to determine whether or

not the premises were a homestead at the time the mortgage was executed, and to decide whether or not the instrument expressed the joint consent of husband and wife; and a judgment involving an erroneous decision of those matters is not open to collateral attack, but is valid and binding upon the parties and their privies until corrected in a direct proceeding for that purpose."

This Court will take judicial notice of the significance under the laws of Kansas of a syllabus to an opinion of its Supreme Court. By an examination of this case it will be readily apparent that it does not support the contention of the petitioner but it is entirely contrary thereto. We invite the consideration of the Clevinger case in its entirety because the eminent judge who wrote the opinion devoted 14 pages to a review of cases of that court and other jurisdictions dealing with the question of the power of a court (possessed of full jurisdiction over the parties and the subject matter) to enter a particular judgment in a particular case.

Distinguished Judge Hyde, speaking for the Missouri Supreme Court, rendered an illuminating and comprehensive opinion in dealing with the power of the court (possessed of jurisdiction over the parties and the subject matter) to adjudge title contrary to mandatory statutes, in *McIntosh* v. *Wiggins*, 356 Mo. 926, 204 S. W. (2d) 770. We refer this Court to what the Missouri Supreme Court said on this question, l. c. 931-932. This opinion is squarely in point and expressly refutes the erroneous contentions made by petitioner in the above regard and likewise refutes other contentions made by petitioner in her brief. It said:

"• • • Such a doctrine would dangerously unsettle land titles. On the contrary, we have held 'that, when a court has jurisdiction, it has jurisdiction to commit error.' (*State ex rel. McGrew Coal Co.* v. *Ragland*,

339 Mo. 452, 97 S. W. (2d) 113.) Therefore, 'no error in the exercise of such jurisdiction can make the judgment void,' nor can 'errors of law in connection therewith.' (31 Am. Jur. 66, Sec. 401; see also 49 C. J. S. 878, Sec. 449.) *State ex rel.* v. *Sevier, supra,* held void an attempt by a court to make an order which it did not have jurisdiction to make. (See also *State ex rel. Missouri State Life Ins. Co.* v. *Hall,* 330 Mo. 1107, 52 S. W. (2d) 174.) Attempting to exercise jurisdiction, which a statute prohibits a court from exercising is a very different matter from making an erroneous decision as to the construction or application of a statute in a case which the court has jurisdiction to decide."

Kansas court in the "Comanche case" and in 1931, Cause 7374 in 1932 expressly held that respondent Moffett (now Weede) by reason of her election under the laws of Kansas was entitled to one-half of the real estate belonging to John Moffett. Petitioner is now many years later attempting by collateral attack to deprive her of the rights accorded her under these judgments which withstood assault in all of the courts.

C-12.

Response to subdivision II, subdivision IV, subdivision VI and other subdivisions of petitioner's brief, contending that the decision of the Court of Appeals in the instant case is in conflict with the decisions of the Courts of Appeals of other circuits.

In support of this contention respondent places primary reliance on the cases hereinafter mentioned and referred to and discussed. We earnestly insist the opinion of the 8th Circuit in nowise conflicts with these cases and that if there should be any conflict that conflict is set at rest by the late decision of your Court in *Collins* v. *Hardyman,* 217 October term, 1950.

Picking et al. v. *Pennsylvania R. Co. et al.,* 151 F. (2d) 240, at l. c. 249-250.

The Picking case has been the subject of frequent discussion since its rendition on August 28, 1945, and has been distinguished in many cases. We think it sufficient to say that that action was against state officials, with the exception of the Pennsylvania Railroad and perhaps others who were charged as co-conspirators, and that the most serious charge contained therein is the charge that the justice of the peace of New York denied the plaintiffs a hearing, in violation of the Constitution. There are no points of similarity between the facts in the Picking case and the facts in the instant case.

Valle v. *Stengel,* 176 F. (2d) 697.

This case involves racial discrimination. Part of the plaintiffs were negroes and part were white persons. They claimed that their Civil Rights were violated on account of their having been forcibly prevented from using a private swimming pool operated in connection with an amusement park. Defendant Stengel was chief of police of the borough of Ft. Lee, New Jersey, and consequently was an officer of the State of New Jersey. Certain of the other defendants were the individuals who managed the park. All of the defendants were charged as co-conspirators. The court, l. c. 704, said:

> "Since, as we have demonstrated, Chief of Police Stengel was acting under color of law, albeit in direct violation of R. S. 10:1-2, N. J. S. A., we entertain no doubt that against the background of the 'privileges or immunities' clause of the Fourteenth Amendment construed in the light of the Slaughter-house cases, *Paul* v. *Virginia* and *Ward* v. *Maryland,* Stengel must be held to have deprived the plaintiffs of the equal protection of the laws."

And on the same page the court further said:

> "We conclude, therefore, that the complaint does state a cause of action because it alleges that civil

rights guaranteed to the plaintiffs by the Fourteenth Amendment and protected by the Civil Rights Acts were invaded by Stengel, acting under color of State law.''

It is readily apparent that there are no facts in the instant case which are in anywise comparable to the facts in the Stengel case.

McShane v. *Maldovan*, 172 F. (2d) 1016.

The defendants in this case were a justice of the peace of the State of Michigan and the constable of his court and others. Plaintiff asserted that she demanded a jury trial by an impartial jury to which she was entitled *by the laws and Constitution of Michigan*, and that the justice of the peace and constable did not follow the law. In consequence thereof she suffered an illegal conviction and sentence and ''was required to appeal her case to the State Circuit Court, where before an impartial jury, she was acquitted.'' In the opinion the court discussed many cases and on page 1022 discussed at length *Bottone* v. *Lindsley*, 150 F. (2d) 705, and distinguished that case from the facts of the case under consideration and quoted approvingly some of the recitals in the Bottone case.

We confidently contend that there are no facts in the instant case which are comparable to the facts in the McShane case.

Under subdivision I, subdivision II, subdivision VI, and elsewhere in her Argument (and also in our Petition filed in this case), the petitioner has referred to an isolated sentence appearing on page 248 of the opinion of the Court of Appeals in the instant case (Pro. 11). She erroneously contends that the recitals in this sentence which are excerpted and stripped from its context, conflict with the decisions of all other circuits and the courts of Missouri, Kansas and England. We shall give con-

sideration to this absurd and unfounded contention in our subdivision C-13 of the instant brief.

C-13.

Response of Commerce Trust Company to Subdivision I, Subdivision II, Subdivision VI, and elsewhere in her Argument and in her Petition, that a sentence appearing on page 248 in the opinion of the Court of Appeals (Pro. 11) conflicts with decisions of all circuits and the Courts of Missouri, Kansas and England.

We think that there is nothing in this erroneous contention which is worthy of reply. We invite the careful scrutiny of the criticized sentence, and ask this Court to consider same in the light of its context in the same paragraph, and in the light of other recitals in the able opinion of the Court of Appeals for the 8th Circuit. Petitioner's counsel attempts to dissect and dismember this sentence and place a construction thereon which we think is not warranted and was not contemplated or intended by the authors of the opinion. If this sentence is to be subdivided, we think the following method of subdividing same would clearly reflect what the court meant by this subdivision, and in doing so, we shall include the one line sentence immediately following this recital. This would result in same being reproduced as follows: "* * * But assuming that the state proceedings were not within the jurisdiction of the courts which decided them * * * nothing in the Civil Rights Acts gives the Federal Court jurisdiction to review them." And secondly, or assuming that this state court proceedings "were contrary to state law or procured by fraud or perjury, they were not void but, at most, erroneous" (and) "nothing in the Civil Rights Acts gives a Federal Court jurisdiction to review them." Nothing in the Civil Rights Acts gives a Federal Court jurisdiction solely because a judgment assailed is void or

voidable, or because a lower court rendered an erroneous decision. There is nothing in this sentence which in anywise indicates that this Court by this hypothetical paragraph intended to say a "void judgment" was binding unless set aside. In writing this sentence authors may have had in mind the erroneous contentions of the petitioner as to the construction of the case of *Vanek* v. *Vanek*, 104 Kan. 624, hereinbefore discussed.

C-14.

Response of Respondent Commerce Trust Company to Petitioner's subdivision VII erroneously contending that the lower court committed error in failing to pass on the motion relating to summary judgment.

The amendment made to the Rules by the provisions of 12 (b) (h) did not become effective until March 20, 1948. Prior to that time, and on December 11, 1947, Judge Reeves sustained a motion to dismiss, based on the Rules as they then existed. Petitioner filed her Second Amended Complaint on March 8, 1948, concerning which the lower court said (R776-777):

> "In drawing the Second Amended Complaint able counsel for plaintiff has sought to avoid the reasoning and conclusions of the opinion filed with the order dismissing the First Amended Complaint. Counsel did this by alleging that, in the several court proceedings used by the defendants for the deprivation of plaintiff's rights, the judge, in each instance, purposely and intentionally made orders and entered decrees violative of the rights of plaintiff and those under whom she claims."

The court further stated:

> "The several defendants have filed motions to dismiss on various grounds, including the one that the Second Amended Complaint bears such similarity to the complaint dismissed as to bring said Second

> Amended Complaint under the bar of the opinion and order above mentioned."

In fact, the Second Amended Complaint did have all of the vices contained in the First Amended Complaint.

We regard the failure of petitioner to comply with the rulings of Judge Reeves as bordering on a contumacious flouting of his opinion.

In response to the Complaint, Commerce Trust Company filed its several motions, all in the alternative, one of which was for a summary judgment, and one of which was a prayer that this Complaint be dismissed for failure to state a claim. To this pleading petitioner filed a countermotion which contained a recital reading as follows:

> "• • • Defendants have failed to comply with Rule 56, and the Court is without jurisdiction to consider their motions for summary judgment, as pointed out in Moore's Federal Practice, p. 2256, discussing Rule 12 (b) (6), pointing out that it is thus converted into a summary judgment motion. But it then says, 'Ten days' notice of such motion should be given in accordance with Rule 56.' Defendants did not give any notice of such motion in accordance with such rule. Consequently their motions cannot be converted into motions for summary judgment."

No notice was ever given fixing a definite date for the hearing before the court of the motion, insofar as same related to the prayer for a summary judgment.

The 8th Circuit Court of Appeals disposed of this question (Pro. 12), stating: "We are unable to see that this action which is clearly within the power of the court has resulted in any prejudice to the plaintiff." That court did not hold that any such right existed but apparently disposed of that question on the ground that if it did constitute error it was "harmless error." Much has been written in late years by the courts, textbook writers and others concerning the doctrine of "Harmless Error."

However, we think these contentions devoid of merit on other grounds. The respondent had filed with Judge Reeves four motions in the alternative. This is permissible under the Rules. After days and days of argument, the consideration of almost innumerable briefs, he concluded that he should sustain the second alternative motion which asked for the dismissal of this case because the complaint did not state facts sufficient to constitute a claim. We summarize the recitals appearing in his last opinion (87 Fed. Supp. 438) as follows: It seems clear to the Court that plaintiff has not and cannot state a cause of action (claim), and that the motions to dismiss should be sustained with prejudice. The opinion fails to state a cause of action and this obviates the necessity of further proceedings in connection with the motion for summary judgment. Judge Reeves was eminently correct in holding that, based upon the allegations of the complaint itself, accompanied by the exhibits therein expressly mentioned and referred to, petitioner did not state a cause of action. He merely decided that it would be futile to have further hearings in connection with the motion for summary judgment.

C-15.

Response to subdivision X of Petitioner's Brief, wherein she erroneously contends that Secs. 87 and 88, Revised Statutes, Mo. 1939, are void.

On account of petitioner having quoted in her Appendix only Secs. 87 and 88 of the Missouri Statutes, we have, in Item 2 of our Appendix (pp. 6 to 9), quoted the related Sections 81 to 86, inclusive, of the same Statutes, and also other pertinent Missouri Partnership Statutes relating to partnership estates. We contend that what petitioner says cannot be understood unless same be considered in the light of the other Statutes quoted in our Appendix. This unfounded contention has been presented by petitioner to

many courts. She presented the same to the Supreme Court of Missouri in the case of *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. (2d) 588 (see top of page 1102). In answer to these contentions the court (on page 1130), said: "Appellants make many other assignments of error assailing the constitutionality of the Missouri Statutes relating to partnership estates," and follows that recital by the following: "Most, if not all of these questions, have been decided adversely to appellant by courts of competent jurisdiction. * * *."

There is nothing to this contention. Furthermore, Thomas S. Moffett, as shown elsewhere in this brief, made his final settlement in the Probate Court of Jackson County, Missouri, and upon exceptions being filed, same was approved as modified, and in compliance with request for instructions contained in his final settlement, and with the order of the court approving his final settlement, he conveyed all of the property to his successor, and did not even appeal from the orders of the Probate Court directing him to so convey to his successor. So, the question of whether or not he might be compelled to go to jail for contempt of the court in refusing to obey its orders never arose in this case.

C-16.

Response of respondent Commerce Trust Company to subdivision XII making the contention that your Court does not have the Constitutional right to dispose of a petition for certiorari in the manner which has obtained throughout the years.

Petitioner sought to review this case by certiorari and not by appeal. We might be content to cite the sage and apposite comment of Judge Harlan F. Stone in *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 88 L. Ed. 692, where he very tersely said:

"The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years' (citing cases)."

WHEN THIS CONTENTION IS STRIPPED OF ALL OF ITS VERBIAGE AND REDUCED TO ITS ESSENCE IT MEANS THAT PETITIONER IS NOW CONTENDING THAT THROUGHOUT THE YEARS YOUR PREDECESSORS AND YOURSELVES HAVE HANDLED THE APPLICATIONS FOR CERTIORARI IN A MANNER CONTRARY TO THE PROVISIONS OF THE CONSTITUTION AND WITHOUT ANY RIGHT OR JURISDICTION SO TO DO.

The writer feels that Sections 1254, 2101 and 2106 of Title 28, U. S. C. (the new Judicial Code) (cited by petitioner) in nowise enlarge the provisions of former Codes but that in some particulars they eliminate certain provisions of the former Codes in such manner as to make them more restrictive.

Section 1254 provides for reviews of cases in the Courts of Appeals by several methods, the first one of which is stated as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

It is to be noted that in the last-quoted clause Congress used the words "by writ of certiorari" which must be construed to mean in accordance with the uniform practice that had theretofore obtained in the United States Supreme Court for many years, and this assumption is predicated upon the universal knowledge possessed by Congress and all members of bench and bar.

On page 20 of petitioner's brief she cites the case of *Durousseau* v. *United States,* 6 Cranch. 307, l. c. 313-314, 3 L. Ed. 232 (wherein an appeal was involved), and quotes an excerpt from what Mr. Justice Marshall said therein. It is notable that petitioner ends the foregoing quotation with a period, and entirely omits the next sentence in the same paragraph reading as follows: "But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."

We think nothing more need to be said except to again refer to the recent illuminating opinion of this Court in the case of *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 94 L. Ed. 562. The pronouncements in that case are supported by an unbroken line of cases in your Court throughout the years. We have made much research on account of this startling contention and have reached the firm conclusion that it is entirely devoid of merit. Further discussion here would unduly prolong this brief. We doubt if petitioner's counsel realizes that this contention in effect says that your illustrious predecessors and the present members of your Court, all learned and able lawyers of outstanding national reputation, have throughout the years in the handling of writs of certiorari *violated the very provisions of the Federal Constitution.* This serious charge is not to be lightly regarded but, fortunately, it does not have a semblance of merit.

Conclusion.

Doubtless in the foregoing there appear inaccuracies as to dates and clerical errors. If on review we find any of them of significance they will be brought to the attention of the Clerk of the Court by an Errata. Throughout, we have been actuated by a sincere desire to present the facts and the law clearly and fairly. We feel, and sincerely hope, that we have not failed in that regard.

We respectfully request this Court to deny the Petition of Petitioner for Certiorari.

Most respectfully submitted,

CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
PHILIP J. CLOSE,
Attorneys for Respondent Commerce Trust Company.

APPENDIX.

ITEM 1.

(This item is a true copy of pages 8 to 10, inclusive, and the top incomplete paragraph and the first complete paragraph on page 11 of our printed record. The other parts of Part III follow on pages 11 to 16 of our record.)

Copy of motion of defendant (now respondent) Commerce Trust Company to dismiss the Second Amended Complaint for failure to state a claim.

(On April 2, 1948, Commerce Trust Company filed a document in the lower court captioned as hereinafter set forth, Part III of which constitutes respondent Commerce Trust Company's motion to dismiss the complaint for failure to state a claim, or claims, upon which relief can be granted. Said caption and the pertinent parts of said Part III follow.)

> Amendments To Defendant Commerce Trust Company's Consolidated Motions, Filed March 20, 1948, Entitled: "Consolidated Motions Of Separately Moving Defendant Commerce Trust Company."

Now comes defendant Commerce Trust Company, and pursuant to leave granted by this Court by its Order dated March 22, 1948 (hereby affirming, restating, realleging, adopting, and incorporating herein by reference, all of the motions, grounds and averments contained in a document entitled "Consolidated Motions of Separately Moving Defendant Commerce Trust Company" and in all of the parts thereof, including the Exhibits therein mentioned and made a part thereof, filed by it in this Court on March 20, 1948), does hereby amend said "Consolidated Motions of Separately Moving Defendant Commerce Trust Company" by adding thereto at the end thereof two new and additional parts, respectively numbered Part III and Part IV, to-wit:

Part III.

Motions To Dismiss Second Amended Complaint For Failure Thereof To State A Claim Or Claims Upon Which Relief Can Be Granted. Exhibits Containing Matters Presented By Defendant Commerce Trust Company In Support Of Said Motions To Dismiss. Adoption By Defendant Commerce Trust Company Of Exhibits Filed By Defendant Orlin A. Weede

[fol. 15] **Containing Matters Now Presented By Defendant Commerce Trust Company In Support Of Said Motions To Dismiss.**

Defendant Commerce Trust Company separately moves that said Plaintiffs' Second Amended Complaint be dismissed on the following grounds, to-wit:

(a) Because said Complaint fails to state a claim or claims against this defendant upon which relief can be granted.

(b) Because each and every paragraph of said Complaint respectively, and all of the allegations therein contained respectively, when supplemented, aided by, and considered in the light of and in connection with all of the other allegations set forth in said Second Amended Complaint, and the Exhibits thereto attached, fails to state a claim or claims against this defendant upon which relief can be granted.

(c) Because it appears upon the face of said Second Amended Complaint and the Exhibits thereto attached that plaintiffs' alleged respective claims and alleged rights of action did not accrue within five years next before the date of the commencement of this suit, and on that account each and all of them have become completely barred by the applicable Statutes of Limitation; and by reason thereof said Second Amended Complaint fails to state a claim or claims against this defendant upon which relief can be granted.

(d) Because as shown by (a) the allegations in said Second Amended Complaint and of the Exhibits thereto attached, and as shown by (b) the facts of which this Court will take judicial notice, and (c) as shown by Exhibits 1 to 27 both inclusive attached to and forming a part of defendant Weede's document hereinafter referred to entitled: "Consolidated Defenses of Defendant Orlin A. Weede" (filed in this cause on March 23, 1948) which Exhibits are herein, as hereinafter appears, adopted by defendant Commerce Trust Company, and also as shown by (d) Exhibits 1 to 12 attached hereto and hereby made a part hereof.

A.

(1) the various judgments, decrees and orders of the Probate Courts of Wyandotte, Morris and Chautauqua Counties in the State of Kansas, mentioned in said Second Amended Complaint; and (2) the various judgments, orders and decrees of the Probate Court of Jackson County, Missouri, entered prior to the death of Thomas S. Moffett and mentioned in said Second Amended Complaint, and the orders of said Probate Court concerning the Hymer Ranch mentioned in paragraph 48 of said Second Amended Complaint; and (3) the various judgments, decrees and orders entered in the District Court of Harper County, Kansas, mentioned in second Second Amended Complaint; and (4) the judgments, decrees and orders of the District Court of Comanche County, Kansas, mentioned in said Second Amended Complaint; and (5) the judgments, decrees, orders and decisions in the Supreme Court of Kansas mentioned in said Second Amended Complaint (including its decision in the case of *Clark* v. *Andrews,* 136 Kan. 23, 13 P. (2) 555); and (6) the various orders, judgments and decrees and decisions of the United States District Court for the State of Kansas and in the United States

Circuit Court of Appeals for the Tenth Circuit mentioned in said Second Amended Complaint; and (7) the various judgments, decrees and orders of the Circuit Court of Jackson County, Missouri, in the case of *Louise McGrew Moffett, et al.*, v. *Commerce Trust Company, et al.*, mentioned in said Second Amended Complaint; and (8) the judgment and decision of the Supreme Court of Missouri, 354 Mo. 1098, 193 S. W. 2d 588 (rendered on the appeal of plaintiffs from the judgment in the last named case), mentioned and referred to in said Second Amended Complaint and also the orders of said Circuit Court of Jackson County, Missouri, respectively, entered on August 23, 1943, and November 8, 1944 (which orders without designation of any dates are respectively referred to in the Second Amended Complaint), respectively overruling the two separate and distinct Separate Motions of Louise McGrew Moffett, Executrix of the estate of Thomas S. Moffett, deceased, to dismiss said cause No. 339134 mentioned in said Complaint, and each and all of the foregoing have become final, and on account thereof same and each of the same are not subject to collateral attack in the instant action; and

B.

the matters and things complained of and alleged and asserted and the issue presented by plaintiffs in said Second Amended Complaint have been decided adversely to the plaintiffs by final judgments, decrees and orders of courts of competent jurisdiction in suits brought by plaintiffs or in which they actively participated as defendants, or in actions and proceedings in which persons standing in privity with the plaintiffs were parties, and on that account have become and now stand as *res judicata*, against the plaintiff in both her individual and in her representative capacities, and said plaintiff is now estopped to con-

tend otherwise in either of said capacities and because plaintiffs, respectively, under the law, cannot in this action make collateral attacks upon said final judgments, decrees and orders or any of them.

By reason of each and all of the foregoing said Second Amended Complaint fails to state a claim or claims against this defendant upon which relief can be granted.

ITEM 2.

Certain Missouri Partnership Administration Statutes.

Petitioner's petition for writ is followed by an Appendix, on page 32 of which are set forth Sections 87 and 88, R. S. Mo., 1939. As these sections constitute only a part of the pertinent statutes we are here setting forth the immediately prior relevant sections relating to the administration of partnership estates, as they appear in R. S. Mo., 1939:

"Sec. 81. *Surviving partner may give bond and administer.*—In case of the death of a member of a copartnership, the surviving partner or partners, resident in this state, shall administer the effects and estate of the copartnership in the county in which the copartnership business was conducted, on giving bond as hereinafter provided. (R. S., 1929, 81.)" (1919, Sec. 80; now R. S. Mo., 1949, Sec. 461.650.)

"Sec. 82. *Failing to do so, the individual administrator shall take charge of entire effects.*—If the surviving partner shall not have administered on the partnership estate at the time the executor or administrator of the estate of the deceased partner shall proceed to take his inventory, it shall be the duty of such executor or administrator to return to the court an inventory of the whole of the partnership estate, goods and chattels, rights and credits, ap-

praised at their true value, as in other cases: *But provided, however,* the administrator shall keep said partnership estate separate and distinct, and shall account and report in all respects for same as a separate estate. (R. S., 1929, 82.)" (1919, Sec. 81; now R. S. Mo., 1949, Sec. 461.660.)

"Sec. 83. *Otherwise only proportional part to be inventoried by individual representatives.* If the surviving partner shall have inventoried and caused to be appraised the partnership estate, the executor or administrator of the deceased partner shall include in the inventory which he is required by law to return to the court the gross amount of the partnership estate, as inventoried and appraised; but the executor or administrator shall be charged with an amount equal only to the proportional part of the deceased in the partnership interest. (R. S., 1929, 83.)" (1919, Sec. 82; now R. S. Mo., 1949, 461.670.)

"Sec. 84. *Bond of surviving partner.*—The surviving partner of partners desiring to administer the copartnership estate shall give bond in such sum as the court may determine, at least double the value of the interest of the deceased partner in the copartnership assets, and with such securities as is required in other cases of administration, conditioned as follows:

> The condition of the above bond is, that if ....., surviving partner of the late firm of ....., shall use due diligence and fidelity in closing the affairs of the late copartnership, apply the property thereof in payment of legal allowances, the expenses of administration, the partnership debts, and in general to do and perform all other acts and things which are or may hereafter be required of him by law, render an account, annually, upon oath, to the court, of all the partnership affairs, including the property owned by the late firm, and the debts, due thereto, as well as what may have been paid by the survivor toward the

partnership debts, and what may still be due and owing therefor, and pay over, within two years, unless a longer time be allowed by the court, to the executor or administrator, the excess, if any there be, beyond satisfying the partnership debts and costs and expenses in closing the affairs of the copartnership, then the above bond to be void; otherwise to remain in full force. (R. S., 1929, 84.)" (1919, Sec. 83; now R. S. Mo., 1949, 461.680.)

"Sec. 85. *When and how executed.*—Any bond required by this article may be executed by the surviving partner in the county in which he resides, and may there be acknowledged before and approved by the probate court, or the judge or clerk thereof in vacation, and shall be certified to the probate court in the county in which administration had been granted on the estate of the deceased partner, subject to the approval or rejection of the court at the next regular or adjourned term thereof, entered of record. (R. S., 1929, 85.)" (1919, Sec. 84; now R. S. Mo., 461.690.)

"Sec. 86. *If such bond is not executed, executor, etc., of deceased partner to give bond, etc.*—In case the surviving partner or partners shall neglect or refuse to give the bond required by this article, within thirty days after the granting of letters testamentary or of administration on the estate of the deceased partner, the executor or administrator of the deceased partner shall give bond, in addition to the bond given by him as executor or administrator, in a sum at least double the value of the whole copartnership estate, secured as bonds in other cases of administration, and conditioned that he will faithfully execute the trust and with no unnecessary waste or expense, which bond may be enforced like other administration bonds. (R. S., 1929, 86.)" (1919, Sec. 85; now R. S. Mo., 1949, 461.700.)

Other pertinent Missouri partnership statutes copied from R. S. Mo., 1939:

"Sec. 91. *Rights of surviving partner and creditors when representative of deceased partner administers.*—Surviving partners and creditors of a partnership taken charge of by the executor or administrator of the deceased partner, as herein provided, may appear in court and defend against the recovery of any claim presented against such partnership, against the partnership effects, and may appeal from the judgment of the court, upon making affidavit and giving bond, as required for appeals in other cases from such court. (R. S., 1929, 91.)" (1919, Sec. 90; now R. S. Mo., 1949, 461.760.)

"Sec. 92. *Laws governing ordinary cases made applicable.*—The administration upon partnership effects, whether by the surviving partner or executor or administrator of the deceased partner, shall in all respects conform to administrations in ordinary cases, except as otherwise herein provided; and the person administering upon partnership effects, and his securities on his official bond, shall perform the same functions and duties, be governed by the same limitations, restrictions and provisions, be subject to the same penalties, liabilities and actions, as other administrators and their sureties. (R. S., 1929, 92.)" (1919, Sec. 91; now R. S. Mo., 1949, 461.770.)

Another pertinent Missouri Statute:

"Sec. 202. *Administrators as creditors—proceedings.*—Any executor or administrator may establish a demand against his testator or intestate by proceeding against his co-executor or co-administrator in the manner prescribed for other persons; but if there be no co-executor or co-administrator, he shall file his claim and other papers,

and the court shall appoint some suitable person to appear and manage the defense. (R. S., 1929, 203.)" (1919, Sec. 202; now R. S. Mo., 464.230.)

ITEM 3.

The following section appears in Article 3 of R. S. Mo., 1939 (the article relating to Trust Companies), to-wit:

"Sec. 8029. *Restrictions on power to accept or execute trusts.*—When any corporation shall have been named as executor in any will hereafter executed, and shall have qualified as such the presumption shall be that such will was not prepared by a salaried employee of said corporation; but upon the application of any heir, devisee or legatee, made in the probate court of the county for the removal of such executor said presumption may be rebutted by evidence satisfactory to the court hearing such application, unless said will or some codicil or certificate attached thereto shall contain a recital that at or before the execution of said will, the testator had advice or counsel in relation thereto from someone not under salary from said corporation. In the absence of such recital, the court may on such application and upon satisfactory evidence that said will was prepared by a salaried employee of said corporation, revoke the appointment of, and remove such corporation as such executor. (R. S., 1929, 5426.)" (1919, Sec. 11804; now R. S. Mo., 1949, 363.230.)

ITEM 4.

References to provisions of the Statutes of the State of Oklahoma relating to partnerships.

Section 54 of Title 54, Oklahoma Statutes, 1941, reads in part as follows:

> "• • • On the death of a partner, the surviving partners succeed to all of the partnership property, whether real or personal, in trust for the purpose of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property. R. L., 1910, 4468."

Section 255 of Title 58 of Oklahoma Statutes, 1941, reads in part as follows:

> "• • • The surviving partner shall settle the affairs of the partnership without delay, and account with the executor or administrator and pay over such balances as may from time to time be payable to such executor or administrator in the right of the decedent. R. L., 1910, Sec. 6305."

In

Leona Rockett Bennett, as an Individual and Executrix of the Estate of Thomas A. Moffett, Deceased,

Petitioner,

vs.

Oklahoma Tower Corporation, a Corporation, Hugh Wood, Grace A. Wood, B. O. Bowers, William H. Kurz and E. E. Cornish,

Respondents.

CORRECTION (ERRATA) TO:

BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

(b) "Petitioner's Brief in Support of Petition for Certiorari"

Charles M. Blackmer,
James E. Gorham,
Hugh M. Hicks,
Peter J. Glass,
Attorneys for Respondent Commerce Trust Company,
Address of Attorneys:
Commerce Building,
Kansas City, Missouri.

In the Supreme Court of the United States

No. 762.
October Term, 1950.

(Now No. 75,
October Term, 1951.)

LOUISE McGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, *Respondents.*

ERRATUM (ERRATA) TO:

BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit."

(b) "Petitioner's Brief in Support of Petition for Certiorari."

This ERRATUM is submitted to correct the following errors as to dates, clerical errors and the like:

(a) Index, P. 3, Point 7, 10th line: change words "this Court" to the Court of Appeals.

(b) Index, P. 3, Point 10, 1st and 3rd lines: change word "this" to the 8th.

(c) Page 5, 11th line: change word "July" to August.

(d) Page 5, 15th line: change figures "1929" to 1930.

(e) Page 9, 2nd line from bottom: change figures "1945" to 1949.

(f) Page 13, 11th line: change word "redressable" to redressible.

(f-a) Page 16, 11th line: change the word "June" to July.

(g) Page 19, indented paragraphs: this is *repetition;* these paragraphs are identical.

(h) Page 19, 4th line from bottom: change word "contents" to context.

(i) Page 29, 6th line from bottom of indented paragraph: change figures "126" to 136.

(j) Page 38, (C-4): change words "Judge Van Deventer" in two places to Justice Van Devanter.

(k) Page 42 (C-7) in 3rd line from bottom of quoted part: add the word not after the word "is."

(l) Page 45, Point 7: make same change as indicated on Page 3 of Index.

(m) Page 46, Point 10: make same changes as indicated on Page 3 of Index.

(n) Page 66, 3rd line: change figures "407" to 707.

(o) Page 66, 5th line: change figures "669" to 699 and add after 699 (75 Pac. 1001).

(p) Page 70, 20th line: change figures "150" to 170.

(q) Page 70, 2nd line in incomplete paragraph at end: change word "our" to her.

(r) Page 71, 7th line from bottom: change word "this" to the.

(s) Page 72 (C-14), 6th line following caption: change "March 8" to February 7.

(t) Page 73, following the indented quotation insert: (R225-226).

(u) Page 74, 13th line: change word "opinion" to complaint.

(v) Page 75, 3rd line from bottom: change word "Judge" before Harlan F. Stone to Justice.

(w) Page 77, 1st line: change figure "20" to 58.

Respectfully submitted,

CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
PHILIP J. CLOSE,
Attorneys for Respondent Commerce Trust Company,
Addresses of Attorneys:
Commerce Building,
Kansas City, Missouri.

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In the Supreme Court of the United States

No. 762.
(October Term, 1950.)
No. 75.
(October Term, 1951.)

LOUISE McGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, *Respondents.*

PETITIONER'S REPLY BRIEF.

STATEMENT.

(1) Points I to VII, pages 3 to 70 of this brief call attention to the law and facts necessitating the issuance of the writ prayed for in the exercise of sound judicial discretion.

(2) Points VIII to XIV, pages 70 to 109, state the facts and the law establishing that the Acts of Congress of March 3, 189[illegible], February 13, 1925, and Section 1254, Title 28, U. S. C., as to their discretionary features, are void, because said Acts undertake to delegate to this Court the legislative power of Congress to make exceptions to the appellate jurisdiction of this Court in this case, whereas Section 2 of Act III of the Constitution provides that Congress only shall make such exceptions.

(3) Point XV, pages 109 to 126, state the facts and the law applicable thereto, showing that the Acts of Congress making exceptions to the appellate jurisdiction of this Court are authorized only as to controversies mentioned in Section 2 of Article III of the Constitution, and that Congress has no power to except any of the cases, including this, which are prefaced in the Constitution by the word ALL from said appellate jurisdiction.

ARGUMENT.

I.

Respondents and state officers, pursuant to a conspiracy, while acting under color of state law in violation of the United States Constitution and laws, fraudulently made use of legal proceedings to deprive petitioner of her property, thereby violating her alleged federal rights and stating a claim on which relief should have been granted.

The complaint alleges that the conspirators, pursuant to the conspiracy alleged, while acting under color of the Constitution, statutes and laws of the States of Missouri, Kansas and Oklahoma, by fraudulent use of legal proceedings, deprived petitioner of the property and rights secured and guaranteed to her by the constitutional provisions and laws alleged in the complaint, thus authorizing recovery under Section 43, Title 8, U. S. C.

The Appendix hereto attached shows that, in addition to the facts alleged as to the conspirators' liability under Section 43, Title 8, U. S. C., said complaint also alleges facts showing petitioner's right to recover against the conspirators for violation of her rights under Section 42, Title 8, U. S. C., alone, and specifically alleges facts authorizing recovery by petitioner under the provisions of Sections 47 (2) (3) and Section 48, Title 8, U. S. C.

Appearing in the Appendix are the numbers of the paragraphs of the complaint, with their record pages, alleging denial of equal protection and due process of laws, and of petitioner's privileges and immunities as a citizen of the United States, as follows:

Par. 1 (R. 3); Par. 2 (R. 4); Par. 3 (R. 4); Par. 7 (R. 6); Par. 17 (R. 13); Par. 18 (R. 13-14); Par. 32 (R. 18); Par. 37 (R. 20); Par. 38 (R. 20-21); Par. 42

(R. 23-24); Par. 47 (R. 26); Par. 48 (R. 27); Par. 51 (R. 29); Par. 52 (R. 29-30); Par. 54 (R. 31-32).

The law as applied in *Collins* v. *Hardyman,* 341 U. S. 651-665, decided June 4, 1951, after the filing of petitioner's petition herein on May 26, 1951, demonstrates that the complaint alleges a cause of action under all of the sections of the Civil Rights Acts alleged, and supplements the authorities referred to in petitioner's supporting brief —which establish that respondents' voluminous briefs incorrectly state both the law and the facts as to this record.

The XIVth Amendment does not restrict the authority exercised by the United States in the District of Columbia (*Lappin* v. *District of Columbia,* 22 App. Cas. (D. C.) 68).

It was for this reason that this Court in *Shelley* v. *Kraemer,* 334 U. S. 1, as to the States of Missouri and Michigan, and on the same identical question, applied the XIVth Amendment, and in *Hurd* v. *Hodge,* 334 U. S. 24, held that the rights of the parties in the District of Columbia were governed, not by said Amendment but by Section 42, Title 8, U. S. C., for at l. c. 30 it appears that the XIVth Amendment was not the basis of the decision enforcing the civil rights of the petitioners there, thus:

> "Upon full consideration, however, we have found it unnecessary to resolve the constitutional issue which petitioners advance; for we have concluded that judicial enforcement of restrictive covenants by the courts of the District of Columbia is improper for other reasons hereinafter stated."

The reasons thereinafter stated establish that it enforced the rights there denied to petitioners under Section 42, Title 28, U. S. C.

And, as that statute by its terms applies to states as

well as territories, and since the conspirators have, in violation of said statute, deprived petitioner as a citizen of the United States of her property rights guaranteed by the Constitution, they are liable therefor, both when acting under color of state law and when as individual conspirators they denied to her her privileges as a citizen of the United States as to her property rights provided for by said section. See *White* v. *Davidson,* 181 U. S. 371, l. c. 384, pointing out that the XIVth Amendment does not apply to rights of citizens of the United States acquired and violated in the District of Columbia, and that such rights were governed by Acts of Congress only.

Said Section 42, by its very terms, and under the construction in *Hurd* v. *Hodge,* is a law which is distinct from and separate from the XIVth Amendment, and applies to "all citizens of the United States * * * in every State and Territory."

In any event, pursuant to the conspiracy itself, and by their overt acts, the conspirators impaired the civil rights of petitioner as guaranteed by the Constitution and laws of the United States, and in doing so were supported by state authority in the shape of state officers, laws, customs and judicial and executive proceedings. So that respondents are liable, not alone for violating petitioner's rights under said Section 42, Title 8, U. S. C., but for violating her constitutional rights guaranteed by the XIVth Amendment, and by Section 2, Article IV, of the Constitution.

We again direct attention to the following from the opinion of the Court of Appeals (Pro. 11):

> "But assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, or that they were contrary to state law or procured by fraud or perjury, they were not void but, at most, erroneous."

(*Moffett* v. *Commerce Trust Company,* 187 F. 2d 242, l. c. 248.)

Cooley on Constitutional Limitations, 7th Ed., page 575, states:

> "Individual citizens require protection against judicial action as well as against legislative; * * *"
>
> * * * * * * *
>
> "If it (a court) assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, *and rights of property cannot be divested by means of them.*" (Italics ours.)
>
> * * * * * * *
>
> "The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act * * *"

followed by the following footnote on the same page:

> "(a) Any action taken by a court in the absence of the facts upon which its jurisdiction rightfully rests is void, and may be collaterally impeached. *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. Rep. 1108, rev. 5 Wash. 809, 31 Pac. 873, 34 Am. St. 863."

The author of the opinion of the Court of Appeals (Pro. 1-14), since its rendition, and in direct conflict therewith, stated the law as it is stated by the above authorities. Thus:

> "A judgment obtained without due process is a nullity and may be attacked directly or collaterally by parties or strangers."
>
> (*Bradley* v. *St. Louis Terminal Warehouse Co.,* 189 F. 2d 818, l. c. 824.)

Said decision (Pro. 1-14) directly conflicts with the decision of every court of every other circuit which has passed upon the question (*McShane* v. *Maldoven,* 176 F. 2d 1016 (C. A. 6)), a good illustration of which is the opinion in *Picking et al.* v. *Pennsylvania R. Co. et al.,* 151 F. 2d 240, where the court said, l. c. 250:

> "(16-18) As to the defendant Keiffer, the complaint alleges that he was a justice of the peace and that he denied and refused a hearing to the plaintiffs upon their arrest on August 15, 1941. If these allegations be proved it may be concluded that the refusal of Keiffer to act as required by law may have deprived the plaintiffs of their liberty *without due process of law in violation of the Fourteenth Amendment.* If the plaintiffs brought a proper proceeding to secure their liberty before Justice of the Peace Keiffer and he refused their cause, he may be answerable to the plaintiffs in damages. The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken 'under the color' of the law of the state. Note the second count of the indictment in the classic case wherein it was charged, *inter alia,* that the defendants refused to count votes cast at a primary election and the language of Mr. Justice Stone from the Classic opinion hereinbefore quoted. In making this statement we are not unmindful of the absolute privilege conferred by the common law upon judicial officers in the performance of their duties. Pertinent authorities relating to the common law privilege are collected and discussed in *United States* v. *Chaplin,* D. C. S. D. Cal. C. D., 54 Supp. 926, and in *Allen* v. *Biggs,* D. C. E. D. Pa., 62 F. Supp. 229. See also Jennings, Tort Liability of Administrative Officers. Selected Essays on Constitutional Law, Vol. 4, pp. 1271-1274. The absolute privilege was extended even to the conduct of judicial officers dictated by malice. But

> the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act *sub judice* intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person.' R. S. 1979 applies to 'every person.' We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states."

The decision in *Snowden* v. *Hughes*, 321 U. S. 1, l. c. 9, is in direct conflict with the language of the opinion of the Court of Appeals, stating (Pro. 11):

> "The charge that the state court judgments were intentionally and purposefully against plaintiff, • • • adds nothing to the force or effect of the complaint. *Snowden* v. *Hughes*, 321 U. S. 1."

Whereas, on pages 9-10 of said opinion of this Court, it is said:

> "Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long continued."

The complaint not only alleges facts showing purposeful discrimination by state judges, but it specifically alleges that said acts were purposeful and intentional—which allegations are shown by the opinion in *Snowden* v. *Hughes* to state a cause of action, for said allegations exclude mere accident or mistake.

Said decision is also in conflict with the opinion in *Burt* v. *City of New York*, 156 F. 2d 791 (C. A. 2), which held

that the complaint alleged a cause of action in a case for damages under Sections 43 and 47 (3). Judge Learned Hand there quoted from *Snowden* v. *Hughes,* holding that if misinterpretation of a statute caused denial of equal protection of the laws is alleged, plus, l. c. 792:

> "* * * an element of intentional and purposeful discrimination,"

it states a cause of action. Judge Hand's opinion proceeds, l. c. 792:

> "* * * but the decision definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also with *purposefully singling him out alone for that misinterpretation,* it is good against demurrer." (Italics ours.)

Said complaint (R. 32) alleges facts showing that petitioner was singled out by the conspirators and state officers for discrimination. Among other such allegations is the following:

> "By such acts said states, through said district judge and said executor and administrators, wilfully, intentionally and purposefully discriminated against plaintiff. Said acts denied to plaintiff the application and benefit of the laws applicable to all other persons in general under the laws of said states and the United States."

Said allegations state ultimate facts which are the antithesis of accidental, mistakenly or unintentionally—and therefore purposeful and intentional—under the law as declared in *Snowden* v. *Hughes.*

Paragraphs 56 and 57 (R. 32-33) of the complaint point out that all the acts were done pursuant to the corrupt

conspiracy unlawfully to deprive Thomas S. Moffett and plaintiff of the rights guaranteed to them by the provisions of the Federal Constitution and laws which were theretofore specified, and that the damage was a direct result of all of said acts or omissions, done pursuant to the conspiracy.

The provision in Section 47 (3), Title 8, U. S. C., that

> "In any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

It follows that if any act done by the conspirators which caused even an "erroneous" decision by a court, wherein a court or judge through mistake or error as to either fact or law, caused by overt acts pursuant to such conspiracy, renders a judgment by virtue of which a citizen of the United States—in violation of the due process or equal protection provisions of the XIVth Amendment or other provision of the Constitution or an Act of Congress—is deprived of his property, then such conspirator is liable for the loss. *Mooney* v. *Holohan*, 294 U. S. 103; *Collins* v. *Hardyman*, 341 U. S. 651-664.

Section 42, Title 8, U. S. C., as construed in *Oyama* v. *California*, 332 U. S. 332-689, and as construed in *Hurd* v. *Hodge*, 334 U. S. 24-36, as to the District of Columbia without aid of the XIVth Amendment, rendered such conspirator liable, whether he was a state agent or not, if such act deprived a citizen of the United States of his

property. But, in view of the fact that state officers were members of the conspiracy, then said complaint covers all the Civil Rights Acts, and states a cause of action both under Sections 43, 47 and 48, Title 8, U. S. C.

II.

The authorities referred to in the petition and supporting brief necessitate the granting of the relief prayed. But even if said authorities had no such effect, yet the law declared in *Collins* v. *Hardyman*, 341 U. S. 651-664, compels the grant of that relief.

The opinion there states, as to the requirements necessary to allege a cause of action under Section 47 (3), Title 8, U. S. C., l. c. 660:

> "The 'conspiracy' required is differently stated from the required overt act and we think the difference is not accidental but significant. Its essentials, with emphasis supplied, are that two or more persons must conspire (1) for the purpose of *depriving* any person or class of persons of the *equal protection of the laws*, or of *equal privileges and immunities under the law;* or (2) for the purpose of preventing or hindering the constituted authorities from giving or securing to all persons the equal protection of the laws; * * * (Emphasis the Court's.)

As to requirement (1) the opinion proceeds:

> "They must, we repeat, be 'for the purpose of *depriving* * * * of the *equal protection of the laws*, or of *equal privileges and immunities under the laws*. (Italics supplied.)"

The alleged conspiracy in that case did not come within requirement (2)—whereas the complaint herein specifi-

cally alleges that the conspiracy was for the purpose of hindering the courts from giving or securing to petitioner the equal protection of the laws.

The language used in said Collins opinion and the allegations in paragraph 1 of the complaint (R. 3) bring this case strictly within the law as declared in said Collins case, for it is alleged:

> "This action is for damages caused by overt acts done and caused to be done pursuant to a conspiracy to which defendants were parties, and who conspired for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the States of Missouri, Kansas and Oklahoma, with intent to deny Thomas S. Moffett and plaintiff, as citizens of the United States, the equal protection of the laws, * * *"

The institution of the groundless actions and suits (R. 9-14) and keeping same on the dockets of the courts for the last 20 years, preventing distribution of testator's estate and otherwise causing the damage alleged, amounts to an obstruction of the due course of justice in Missouri, Kansas and Oklahoma, and comes within that variety of conspiracy described in Section 47 (3) covered by said opinion, and also in Section 47 (2), Title 8, U. S. C., as follows:

> "* * * if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, * * *"

The complaint also alleges conspiracy falling within the following provision of Section 47 (3):

> "(3) If two or more persons in any State or Territory conspire * * * for the purpose of depriv-

ing, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * *"

The Collins opinion recognizes that Congress has, in the narrow class of conspiracies defined by Section 47 (2) (3), included the conspiracy charged here. For, in Missouri, the common law of conspiracy is in force, made applicable herein by Section 49a, Title 8, U. S. C., and Section 47 is in fact a duplicate of the Statute of 33 Edw. 1, Stat. 2, sometimes cited as 21 Edw. 1. See *State* v. *Dalton and Fay,* 134 Mo. App. 517, l. c. 528-529, quoting said statute defining conspiracy as follows:

> "Conspirators be they that do confederate or bind themselves by oath, covenant or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, *or falsely to move or maintain pleas,* * * *"

The same statute is in force in Rhode Island. In *State* v. *Bacon,* 61 Atl. 653, 27 R. I. 252, the opinion conclusively establishes the fact that the institution of a groundless action was an obstruction of justice, authorizing redress even during the pendency of the groundless action. Said the court, l. c. 655-656:

> "As to the second count, which charges a conspiracy to pervert or obstruct justice, it charges an offense recognized by the common law. 'Any confederacy or combination, the purpose of which is to obstruct the due course of justice or the due administration of the laws, is an indictable conspiracy.' 8 Cyc. 634; *State* v. *Ripley,* 31 Me. 386. 'All con-

spiracies which have for their object the perversion or obstruction of public justice have been, from the earliest times, regarded as indictable.' 6 Am. & Eng. Ency. L. (2d Ed.) 856; *State* v. *Burnham*, 15 N. E. 396; *State* v. *Norton*, 23 N. J. Law 33; *The People* v. *Chase*, 16 Barb. 495; *Com.* v. *Douglass*, 5 Metc. 241; *State* v. *Noyes et al.*, 25 Vt. 415. Also, although it is not necessary that it should be, the second count of the indictment is clearly within the purview of 33 Edw. I, St. 2, in part as follows: 'Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas,' etc. The words 'falsely to move or maintain pleas' do not mean, as the defendant argues, the setting up of a false defense. *The evident intent of the statute was to include within its definition those who combine for the purpose of perverting or of obstructing justice through either the criminal or civil jurisdiction of its tribunals. The word 'pleas'* as used in the statute, *is equivalent to 'actions.'* The very name of the court in which the indictment in question was found, viz., the 'common pleas division of the Supreme Court,' is indicative of the place where the pleas of the common people are heard, 'Common pleas: The name of a court having jurisdiction generally of civil actions. Such pleas or actions as are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature.' In England, whence we derive this phrase, common pleas are so called to distinguish them from pleas of the crown.' 'Pleas of the Crown: In English law, a phrase now employed to signify criminal causes in which the King is a party.' Bouvier's Law Dict., Rawle's Revision. Furthermore, the word 'pleas' is broad enough to include the plaintiff's statement of his cause of action as well as the defendant's recital of his ground of defense."

An action for damages occasioned by overt acts pursuant to a conspiracy, whether such overt acts be, or not be, groundless litigation, is an action on the case for conspiracy, and not an action for malicious prosecution.

> "Conspiracy to Use Legal Proceedings Fraudulently to Injure Another.
>
> "Where parties, in pursuance of a conspiracy or combination for that purpose, fraudulently make use of legal proceedings to injure another, an action lies against them, at the suit of the person injured, to recover damages sustained. And the fact that a combination for fraud has been brought to a successful end by false testimony produced on the trial does not make an action for conspiracy obnoxious to the rule that there can be no civil action for perjury or subornation of perjury. By statutory provision in some states, it is a misdemeanor for two or more persons to conspire falsely to maintain any suit, action or proceeding." (12 C. J., p. 588, Sec. 110 3, citing *Verplanck* v. *Van Buren*, 76 N. Y. 247.)

In *White* v. *Scarritt*, 341 Mo. 1004, an attorney and a corporation he represented instituted a groundless suit against President Truman, then presiding county judge, and others, which resulted in damage to a property owner. It was contended there, as here, that the property owner's suit was merely an action for malicious prosecution, and that the suit was a typical taxpayer's suit, authorizing its institution. Said the court, l. c. 1012:

> "Of course, a taxpayer may seek relief from taxes believed unlawful. * * * However, the privilege may not be used for an unlawful purpose. Under pretense of seeking such relief, he may not use the litigation to extort money from another. One may carry upon his person an unconcealed weapon. His motive may not be questioned. However, if he unlawfully uses the weapon, his motive in carrying the same

may be for consideration. • • • The numerous authorities cited by defendant ruling such questions are without application. Furthermore, malicious attachment and malicious prosecution cases are also without application."

In *Kilgore* v. *Dr. P. Phillips & Sons,* 12 So. 2d 465-467 (152 Fla. 578), a judgment for damages caused by the institution of a groundless action pursuant to a conspiracy was affirmed. Said the court:

"The alleged malicious conspiracy consisted not alone in having the suit of *I. Zemurray* v. *Kilgore* brought in the circuit court, but in keeping it in litigation for years and thereby injuring the credit and financial rating of Kilgore in his business, • • •"

• • • • • •

"(1) The declaration contains all the essential elements of malicious conspiracy. It alleges a conspiracy by the defendants to damage the credit and financial rating of the plaintiff; it alleges the overt act done in pursuance of the conspiracy, the bringing of the suit and the damages resulting from the overt act."

• • • • • •

"(6) Much is said in the briefs in reference to the relation of an action for malicious conspiracy to that of malicious prosecution but we consider and treat this as an action for malicious conspiracy to injure the credit and financial rating of the plaintiff. We find no reason for confusing the actions or to be in doubt as to which we are confronted with here."

See also authorities under Reason VIII, page 24 petition for certiorari, among which are the opinions of this Court in *Sovereign Camp Woodmen of the World* v. *O'Neill,* 266 U. S., l. c. 297.

Sections 645 and 646, R. S. Mo. 1939, adopted the common law as to conspiracy (see *State* v. *Dalton*, 134 Mo. App. 517).

Section 4632, R. S. Mo. 1939, duplicated the common law as to conspiracy embodied in 33 Edw. I, reproduced in *State* v. *Dalton, supra,* at l. c. 528-529, thus, in part:

> "Conspirators be they that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other * * * *falsely to move or maintain pleas.*"

Since this is a case wherein respondents' motion to dismiss admitted the truth of the allegations contained in the complaint—and the court held that said truth did not state a cause of action—these respondents cannot, in this Court or any other, rely upon the claim that said judgments and the decisions of the courts with reference thereto—including the denial of certiorari in this Court—are *res judicata.*

In *State* v. *Bacon, supra,* the court further said, l. c. 656:

> "Conspiracy to obtain money from an individual or a corporation is a crime well known to and recognized by the law. *State* v. *Buchanan,* 5 Har. & J. 317, 9 Am. Dec. 534. It is unnecessary to wait for the determination of the action at law before charging conspiracy. Prosecutions for conspiracy are preventive, rather than curative, measures. To constitute the crime of conspiracy it is not necessary that the conspirators should succeed. *The State* v. *Norton, supra; The People* v. *Chase, supra.* It is not necessary to aver that the object of the conspiracy has been accomplished."

In *Oyama* v. *California*, 332 U. S. 633, the Chief Justice held that California's acts, l. c. 640:

> "'* * * deprives Fred Oyama of the equal protection of California's laws and of his privileges as an American citizen. In our view of the case, the State has discriminated against Fred Oyama; * * *'"

The order of the Missouri "special" probate judge, appointing Commerce Trust Company in conflicting capacities, and the judgment entries of the Kansas courts, deprived petitioner and her testator of the rights secured to them as citizens of the United States, and secured to them by the privileges and immunities clause of Clause 1, Section 2, Article IV of the Constitution, thus depriving them of the equal protection of Missouri and Kansas law, and of their privileges as American citizens, and discriminating against them.

III.

The issue as to conflicting interests resulting in void judgments was decided against respondents by the judgment in *Re Moffett Brothers Partnership Estate*, 345 Mo. 741-751, and said judgment of the Missouri Supreme Court is now *res judicata* herein against respondents and conclusively establishes the denial of petitioner's federal rights.

In *Moffett* v. *Commerce Trust Company*, 354 Mo. 1098, at l. c. 1129 it is said:

> "The only point decided was that Howard was not entitled to an additional fee. (345 Mo. l. c. 745)."

The basis for said judgment and decision in 345 Mo. 741 was that Mr. Howard and Commerce Trust Company represented conflicting interests (345 Mo. l. c. 750, 751, and R. 48, 49-50, 699, 701) when they caused the

judgment entries to be made in favor of the John Moffett estate, of which Commerce Trust Company was executor, and against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate.

The mandate of the Supreme Court in that case appears in the record (R. 692-701) here, in the last paragraph thereof. Thus (R. 701, 50):

> "The judgment should be reversed and the cause remanded with directions to enter a judgment denying claimant any additional fee, * * *"

Said issues so found established that said Kansas judgments were void, and conclusively establishes that the sacrifice of petitioner's properties to satisfy same was a denial of petitioner's alleged federal rights. (*Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322; *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777; *Yager* v. *Liberty Royalties Corp.*, 123 F. 2d 44; *Miller's Adm'r* v. *Bidlingmaier*, 26 Mo. 483; *Mueller's Adm'r* v. *Reinhardt*, 31 Mo. 95; *Peyton* v. *Chase County Nat'l Bank*, 124 Kan. 763, 766).

The record shows that respondents relied on said Kansas judgments, both state and federal, as *res judicata* and entitled to full faith and credit (R. 658-663, Statement B. C. Howard) as a basis for the alleged action in the Missouri Supreme Court. The Circuit Court found said issues in favor of respondents (Findings of Fact R. 663-664; Conclusions of Law R. 685-691). But the Missouri Supreme Court refused to give effect to said Kansas judgments as *res judicata*, or as entitled to full faith and credit, and reversed the decision of the Circuit Court based on said judgment and orders, with directions to the Circuit Court to enter a judgment denying Mr. Howard any fee for said services. Said reversal with direc-

tions, under Missouri law, is *res judicata* of the issues so determined, as to such issues in this case. (See *Hecker* v. *Bleisch,* 327 Mo. 377, l. c. 385; *Stump* v. *Hornback,* 109 Mo., l. c. 277; *Chouteau* v. *Allen,* 74 Mo. l. c. 59; *Shroyer* v. *Nicholl,* 55 Mo. l. c. 270).

In *Denny* v. *Guyton,* 331 Mo. 1115, l. c. 1131, the court *en banc* cited the above cases and said:

> "These earlier cases mentioned establish the rule of *res judicata,* followed in the later cases cited, by the determination of the issues on a former appeal, and have been followed in the later cases cited."

In *Dickey* v. *Heim,* 48 Mo. App. 114, the Missouri law is well stated, thus:

> "'A verdict and judgment are conclusive by way of estoppel only as to those facts which were necessarily involved in them, without the existence, proof or admission of which such a verdict and judgment could not have been rendered.' It is denominated a reasoning backward from the judgment to the basis on which it stands, 'upon the obvious principle, that where a conclusion is indisputable and could have been drawn only from certain premises the premises are equally indisputable with the conclusion.' *Burleu* v. *Shannon,* 99 Mass. 203."

This issue was presented in Point 5 on pages 50 to 53 of petitioner's brief in the Circuit Court of Appeals, but said court wholly ignored it, and no mention is made of said point in its opinion (Pro. 1-14). On the contrary that opinion says (Pro. 11):

> "All that the complaint in the present case charges against the individual defendants is that by their resort to the State courts for the settlement and administration of complicated estates the plaintiff,

as one of the interested parties, has been involved in expensive, prolonged and *generally unsuccessful litigations.*" (Italics ours.)

In ignoring said decision of the Missouri Supreme Court, the Court of Appeals rendered a decision directly in conflict with the opinion and decision of this Court in *Cooper* v. *Newell,* 173 U. S. 555, answering certified questions by the fifth circuit as to the duty of a Federal Court in Texas to give effect to a judgment of a Texas court, saying, l. c. 567:

> "And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states."

This action necessitates the granting of the writ prayed under that part of Rule 38 5 (b) of this Court, viz:

> "* * * or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

"POINT 5"

(Pages 50-53 of Appellant's (petitioner's) Brief in Court of Appeals is here set out)

The issue herein as to conflicting interests, resulting in void judgments, is *res judicata* against appellees by reason of the judgment in 345 Mo. 741-751.

The decision of the Supreme Court of Missouri, 345 Mo. 741 (692-701, 37-50), was rendered many years after the decisions in the Kansas State and Federal Courts,

and appellees cannot collaterally attack said decision by their reliance upon the decisions which it held were not *res judicata* nor entitled to full faith and credit, and which decisions were based upon facts which rendered them void.

> " • • • where there are two conflicting judgments, the last in point of time is the one which controls." (*Donald* v. *White Lumber Co.*, 180 F. 2d 435.)

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, *it is a valid exercise of judicial power by the second court.*" (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, l. c. 78.)

> " • • • the last judgment controls and determines the right of the parties. The *second* judgment cannot be collaterally impeached by showing the first." (Freeman on Judgments, 5th Ed., Vol. 2, Sec. 629.)

Paragraph 45 (25) of the second amended complaint alleges the filing of a claim by appellee Howard for attorney's fees against his client, Moffett Brothers partnership estate, for his alleged services (against it) in the Harper County litigation. The lower courts rendered judgments in his favor, whereupon this appellant appealed. It is then alleged (25):

> "On appeal by plaintiff, the Supreme Court of Missouri reversed the judgment of the Circuit Court on March 6, 1940, with directions to said circuit court not to allow Mr. Howard any fee for such services. The Official Reporter's Report of the briefs of counsel, and the opinion of said court, is made part hereof as Exhibit 'E'. The same questions were litigated in the Probate Court which were litigated in the Supreme Court, among which were whether

> the decisions in the Kansas courts were *res judicata* and entitled to full faith and credit. The Probate and Circuit courts held in the affirmative, but the Missouri Supreme Court reversed. The issues decided by the Supreme Court are *res judicata* herein."

In addition to reversing the judgment of the Circuit Court, the judgment of the Supreme Court of Missouri recites (702):

> "It is further considered, ordered and adjudged by the court that the said cause be remanded to the said Circuit Court of Jackson County with directions to enter a judgment denying claimant (respondent) any additional fee, * * * "

In *State ex rel.* v. *Patton,* 271 Mo. 554, l. c. 559-560, it is said:

> "In order that a judgment may conclude the parties in a subsequent suit, the cause in which the judgment was rendered need not involve the same facts nor the same claim or demand which was adjudicated in a prior action; the test is whether there is an identity of issues. A former judgment is conclusive in a second suit between the same parties where the same *legal right* as that involved in the former suit comes again in issue, although the second suit is upon a different cause of action. This applies to successive suits brought on a continuing or recurring cause of action (citing cases). Nor does it matter that additional paries are made defendants in this case, because the party pleading the estoppel and the party against whom it was pleaded were both parties to the former action."

Though not expressly mentioned, the Supreme Court of Missouri decided against appellees' contention as to the *res judicata* and full faith and credit effect of the Harper County judgments.

The judgment of the Circuit Court, including its findings of fact (663-684) and conclusions of law (685-691) ruled that the Harper County alleged judgments were *res judicata* and entitled to full faith and credit. Appellees tendered said issue in the Supreme Court of Missouri (658-663).

It was a condition precedent to the judgment of reversal with directions (692-701) that the Supreme Court of Missouri decide as it did—that said alleged judgments were neither *res judicata* nor entitled to full faith and credit. And, though the opinion and judgment are silent as to said issue, yet the record discloses that it was necessarily determined, and is *res judicata* herein in favor of appellant.

Goedecke v. *Gralnick*, 354 Mo. 478, l. c. 487-488, says:

> "But even conceding the cause of action in this case is not the same as that in the 1942 cases, at least the same fundamental issue was common to both litigations. And if that issue *necessarily* was decided adversely to the bank in former cases, it is *res judicata* here, *even though the former judgment did not expressly determine it.* In that event we must look to the pleadings and evidence to see what issues, ultimate or supporting, were passed upon."

The Missouri court there adopts the following as the law, which bound the District Court:

> "Matters which follow by necessary and inevitable inference from the judgment—findings or determinations of the court in relation to the subject matter of the suit which are necessarily implied from its

final decision, as being detrminations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words, * * * The general rule applies and this is so, although the matter necessarily determined was not in issue under the pleadings, and notwithstanding a constitutional provision requiring the court to consider and decide every point fairly arising upon the record and give its reasons therefor in writing. In other words, it is allowable to reason back from the judgment to the basis on which it stands, and, regarding the judgment as a conclusion, and finding it to be one which could have been drawn only from certain premises, the premises are equally *res judicata* with the conclusion itself. (34 C. J., p. 923, Section 1231.)"

The Supreme Court of Missouri not only found the facts, to-wit: the representation by Commerce Trust Company and B. C. Howard of conflicting interests (48, 48-50), which made the Harper County judgment void—but said Supreme Court went further and decided the issue tendered (661) by said Commerce Trust Company and B. C. Howard and found by the Circuit Court in favor of their contentions, to-wit: that the Harper County judgments were *res judicata* and entitled to full faith and credit in favor of their contentions (687-699)—yet the Supreme Court of Missouri rejected their contention and decided said issue so raised by them AGAINST THEM AND IN FAVOR OF APPELLANT (petitioner) (702, 692)."

At petitioner's request, the Clerk of the Court of Appeals has transmitted a certified copy of her brief in that court to the Clerk of this Court—occasioned by the failure of the Court of Appeals to decide that the judgment of the Supreme Court of Missouri in 345 Mo. 741-

751, as to the Kansas judgments relied on by respondents, was *res judicata,* as required by the rule stated in *Lawrence* v. *State Tax Commission,* 286 U. S. 276-285, l. c. 282:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked."

The finding by the Missouri Supreme Court of the conflict which rendered the Kansas judgments void (345 Mo., l. c. 750, 751, R. 48, 49-50) and its refusal to give the *res judicata* and full faith and credit to said Kansas judgments prayed by the respondents, renders the issue as to the void Kansas judgments conclusive in this Court as *res judicata* against the contention of respondents that such Kansas judgments are *res judicata* in their favor as alleged in paragraph 45 of the complaint—as more fully appears from the description of the acts of the judges mentioned in Point 7 on pages 45-46 of Commerce Trust Company's brief, set forth in Point IV of this reply brief.

Said judgment of reversal, with directions, disposing of the case, was final under the law as declared by the Missouri courts and this Court. *Smith* v. *Adams,* 130 U. S. 167, l. c. 177, says:

> "A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case."

IV.

Respondents' claim that the void judgments and orders on which they rely as being *res judicata* is refuted by the record, for the reason that they are void acts of some judges named in Point 7 on pages 45-46 of Commerce Trust Company's brief.

The acts of the judges so named, in connection with the void judgment entries and orders, are referred to as follows:

Petitioner's complaint attacks void judgment entries and orders. Said complaint never named any judge. Respondents give their conclusion that petitioner's attacks were on judges, instead of on void judgments and orders.

The animus of respondents is reflected in their unfounded statement on page 77 of Commerce Trust Company's brief, wherein they seek to switch petitioner's attack on the void acts of Congress, delegating its legislative powers to this Court, to the following:

> "We doubt if petitioner's counsel realizes that this contention in effect says that your illustrious predecessors and the present members of your Court, all learned and able lawyers of outstanding national reputation, have throughout the years in the handling of writs of certiorari *violated the very provisions of the Federal Constitution.*" (Italics Commerce Trust Company's.)

Said counsel had called attention to paragraph 2, Section 2 of Article III of the Constitution:

> "* * * In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Also to the fact that Congress, having been itself charged by said language of the Constitution with the

duty of making exceptions to the appellate jurisdiction vested in this Court by said provision of the Constitution, could not relieve itself of said constitutional obligation and vest in this Court discretionary power to make the exceptions which the Constitution declared only the Congress could make.

It was the duty of said counsel to raise said questions, as recognized in the opinion of this Court in *Von Moltke* v. *Gillies,* 332 U. S. 708, l. c. 726, citing in its Note 9:

> "American Bar Association, Canons of Professional and Judicial Ethics, Canon 15: 'The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. *No fear of judicial disfavor* or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense." (Italics ours.)

We now call attention to some acts of some of said judges so named by Commerce Trust Company.

The propriety of raising the questions raised is established by the following from the opinion of this Court in *O'Donoughue* v. *United States,* 289 U. S. 516, l. c. 532:

> "Chief Justice Marshall, in the course of the debates of the Virginia State Convention in 1829-1830 (pp. 616, 619), used the folowing strong and frequently quoted language:
>
> > 'The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. * * * I

> have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.' "

Missouri "Special" Probate Judge.

(1) The only "special" probate judge of Jackson County, Missouri, alleged to be a conspirator in petitioner's second amended complaint was the "special" probate judge referred to in paragraph 2 thereof (R. 3-4). Said paragraph meticulously describes his wrongdoing. Said paragraph alleges that he violated his first duty as a judicial officer, contrary to the law quoted in *American Ins. Co.* v. *Lucas,* 38 F. Supp. 926, l. c. 931-932, by a three-judge court, of which the District Judge in this case and Judge Stone (former Chief Judge of the eighth circuit) were members, wherein, citing a decision of the eighth circuit, they said:

> "As said by the Court of Appeals for this Circuit: 'the first duty (of a judicial officer) is to see that those who minister in the temple of justice shall not invoke his authority for the accomplishment of fraud.' *Zeitinger* v. *Hargadine-McKittrick Dry Goods Co.,* 8 Cir., 244 F. 719, 723. * * * We believe it more essential to preserve the integrity of the courts than to terminate particular litigations. So long as there remains anything which a court can do in a particular litigation to protect its integrity, we think it has power to act: * * *"

(2) Commerce Trust Company's attorney (C. 416-417) refreshed said "special" probate judge's recollection by stating that Thomas S. Moffett was removed "on account of the conflict of interest" and pointed to the unlawful provision inserted by Commerce Trust Company's attor-

ney in John Moffett's will as consideration for writing it and said:

> "* * * I think that the Commerce Trust Company is entitled to appointment * * * if the Trust Company is appointed, it will give its very best service possible, in connection with this, and act in justice and fairness to all the parties interested, * * *"

The counsel who so stated was found guilty by the Supreme Court of Missouri of representing both sides in the same case (345 Mo., l. c. 750, 751), and of having accepted $6,000.00 (R. 25, 700-701) for his disloyalty to one client in denuding it of its property for the benefit of the client who paid him the $6,000.00.

And though the basis of the "special" judge's order of removal or revocation was the law declared in *State to Use Miller's Adm'r* v. *Bidlingmaier,* 26 Mo. 483, and *State to Use Mueller's Adm'r* v. *Reinhardt,* 31 Mo. 95, Commerce Trust Company knowingly caused (R. 168) said "special" probate judge, knowingly and in direct violation of the law on the point, to make an order appointing Commerce Trust Company to administer the conflicting estates on December 28, 1928. The complaint alleges (R. 4):

> "Said order was made for the purpose of enabling Commerce Trust Company as an agent of the State of Missouri to prosecute fictitious claims for its benefit as executor of the estate of John Moffett against itself as administrator of said partnership estates, and to institute and maintain said fictitious claims hereinafter mentioned, and hereby through intentional and purposeful discrimination against Thomas S. Moffett and plaintiff to deprive them of their property without due process of law, and deny to them the equal protection of the laws and of all the rights guaranteed by said XIVth Amendment."

Said "special" probate judge thus had actual knowledge of the fact that Commerce Trust Company had committed a misdemeanor in writing the will of John Moffett (R. 7-8) in violation of the law of Missouri (*State ex inf. Miller* v. *St. Louis Union Trust Co.,* 335 Mo. 845, l. c. 869-870)—which act was also a violation of the public policy of the State prohibiting traffic in the office of administrator (*In re Irwin's Estate,* 123 Mo. App. 508, and the other authorities shown on pp. 37 and 38 of petitioner's supporting brief herein). Said act of Commerce Trust Company, in consideration of its appointment, was the "corrupt procuring of an appointment to an office of trust." So that, the act of said "special" judge amounted to a denial to Thomas S. Moffett and petitioner of the equal protection of the laws guaranteed by Section 1 of the XIVth Amendment to the Constitution, and was an overt act done pursuant to the conspiracy between himself and the Commerce Trust Company and the other conspirators—as a direct result of which they were enabled to proceed to the District Court of Harper County, Kansas, and cause the rendition of the void judgment entries and orders against Commerce Trust Company as Missouri administrator and the loss of petitioner's properties—constituting a denial of petitioner's privileges and immunities while in Kansas, created by Clause 1 of Section 2 of Article IV of the Constitution of the United States, and a violation of all the provisions of the Constitution and laws of the United States alleged in the second amended complaint. The acts of said "special" probate judge entailed the consequences to a state judge outlined in *Picking* v. *Ry. Co.,* 151 Fed. 2d 240, l. c. 250, col. 2.

(3) The iniquity of the act of appointing a disqualified administrator in Missouri is shown by the fact that there can neither be an appeal from an order of appointment

(*State ex rel. Grover* v. *Fowler,* 108 Mo. 405), nor—if Commerce Trust Company's point 12, page 47, of its brief be right—can a collateral attack be made thereon. And yet Commerce Trust Company claims, on pages 9 and 10 of its brief, that a recital in John Moffett's will—placed therein pursuant to the statute referred to in its Appendix, Item 3—authorized the removal of Commerce Trust Company. Whereas the said statute points out that "In the absence of such recital, *" the executor may be removed. Said recital was placed therein for the express purpose of preventing removal. So that the only relief for the wrong of the State is under the Federal Civil Rights Acts.

(4) On pages 10 and 11 of its brief the Trust Company claims it was without pecuniary interest, and states that petitioner does not charge that it had any. The Missouri Supreme Court in *State ex inf. Miller* v. *St. Louis Union Trust Co.,* 335 Mo. 845, at l. c. 864, points out that the Trust Company in said cause made a similar claim—which the court rejected by stating:

> "* * * these mere nominations (as executor) have resulted in attaching business for the transaction of which respondent's annual compensation exceeded $250,000 for each of the years 1926, 1927, 1928, 1929 and 1930."

Said order as alleged in said paragraph 2 (R. 3-4) by said "special" probate judge was the basis for the institution of the many groundless actions (R. 9-14) instituted by Commerce Trust Company, and for its overt acts committed in Missouri, Kansas and Oklahoma. So that, said "special" probate judge, in making said void orders, knowingly and intentionally, under color of state laws, committed most grievous and redressable wrongs against petitioner, resulting in the denial of the Federal rights

alleged, and authorizing recovery under the Civil Rights Acts.

State District Judge Harper County, Kansas.

(1) The acts of the first judge so named by Commerce Trust Company are discussed in the statement in petitioner's petition for certiorari and in Reasons II, IV, VII and XI on pages 21-22, 22, 23-24 and 26 respectively of said petition. His acts are likewise discussed in the statement, and on many other pages of petitioner's supporting brief.

Said judge unlawfully permitted Commerce Trust Company, in conflicting capacities, to intervene in his court (R. 18-19). Said unlawfulness was called to his attention (R. 168), so that he purposefully discriminated against petitioner.

Peyton v. *Chase County Nat'l Bank,* 124 Kan. 763, 766.
State ex rel. v. *Bradbury,* 123 Kan. 495.
Yager v. *Liberty Royalties Corp.,* 123 F. 2d 44.
Globe & Rutgers Fire Ins. Co. v. *Hines,* 273 Fed. 774, 777.
Phoenix Ins. Co. v. *Erie Transportation Co.,* 117 U. S. 312, 322.
Miller's Adm'r v. *Bidlingmaier,* 26 Mo. 483.
Mueller's Adm'r v. *Reinhardt,* 31 Mo. 95.
Clark v. *Crosswhite & Fountain,* 28 Mo. App. 34, l. c. 37-38.
Arrington v. *McCluer,* 326 Mo. 1011, l. c. 1025.
State v. *Stahlhuth,* 183 S. W. 2d 384, l. c. 389.
In re Estate of Padgett, 114 Mo. App. 308, l. c. 316.

Said judge, as established by the judgment in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751, permitted B. C. Howard to act as attorney for Commerce Trust Company in both said conflicting capacities in his

court, notwithstanding a judge and an attorney, both in Missouri and Kansas, are bound by Canon 6 of the Canons of Ethics of the American Bar Association, as adopted by the Supreme Court of Kansas, as shown in 107 Kan., 108 Kan., 110 Kan., 112 Kan., 135 Kan., page IV, 140 Kan., page VII, 156 Kan., page IV, as follows:

> "• • • It is unprofessional to represent conflicting interests, except by express consent by all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client it is his duty to contend for that which duty to another client requires him to oppose."

Said Canon 6 is incorporated in its Rule 35 by the Supreme Court of Missouri (335 Mo., p. VII).

Judge Learned Hand calls attention to said age-old rule in *Silberger* v. *Prudence Bonds Corp.*, 180 F. 2d 917, l. c. 920-921, citing English and Missouri authority, thus:

> "Certainly by the beginning of the Seventeenth Century it had become a common-place that an attorney must not represent opposed interests; • • • "

Bowman v. *Bowman,* 153 Ind. 498, as to an affidavit showing that an attorney represented both sides, said, l. c. 507:

> "The circumstance disclosed by the affidavit of the appellant *made it the imperative duty of the court* to exclude Mr. East from participation in the case as an attorney for the appellee. Weeks on Attorneys at Law, Secs. 120, 277. *Wilson* v. *State,* 16 Ind. 392; *United States* v. *Costen,* 38 Fed. 24." (Italics ours.)

In *Baker* v. *Humphrey*, 101 U. S. 494, 25 L. Ed. 1068, l. c. 502, it is said:

> "It is always dangerous for counsel to undertake to act, in regard to the same thing, for parties whose interests are diverse. • • •
>
> The legal profession is found wherever Christian civilization exists. Without it, society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability and integrity, prove faithful to their trusts and worthy of the confidence reposed in them. *Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients.*" (Italics ours.)

Mr. Howard's testimony conclusively establishing said Judge's failure to perform his "imperative duty" appears from the opinion in *In re Moffett Brothers Partnership Estate*, 345 Mo. 741-751. So that, the issue as to his unlawful and improper conduct depriving petitioner of her property without due process of law, and denying the equal protection of the laws, and denying to her the privileges and immunities in violation of the United States Constitution and laws as alleged in the complaint, is now *res judicata* in this case against respondents.

(2) Said Judge, without notice to petitioner's counsel, held a secret conference at his home town (R. 594) with Commerce Trust Company's counsel on Washington's Birthday 1932 (R. 183, 569, 593-594) during which he ruled (R. 182-183, 241 Par. 4) in accordance with the wishes of said emissaries and Commerce Trust Company (R. 102, 114). That his conduct was improper is established by the opinion in *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, where, citing Missouri authority, it is said, l. c. 541:

> "There are, however, cases where the courts have emphasized the correlative duty of the lawyer to depend solely upon the merits of his client's case and to abstain from all efforts to throw into the scales of justice the weight of his personal influence with the man upon the bench. The legal profession has formulated this primary obligation of the lawyer in the Canons of Professional Ethics of the American Bar Association which provide that a lawyer shall not communicate or argue privately with the judge as to the merits of a pending case, and which denounce any device or attempt to gain from a judge special personal consideration or favor.
>
> The courts enforce these rules by disciplinary action. The attorney who attempts by personal influence to control a judge or jury in their decision in a pending case, or who merely holds himself out as able to do so, whether or not he actually makes the attempt, and whether or not he succeeds or fails in the attempt, in short, an apostate lawyer, who is false to the lawyers' creed that justice shall be undefiled, is ejected from the courts, and as a lawyer ceases to exist. (Citing cases.)
>
> The client who with evil intent employs such an agent fares no better in the instant case. To him also the doors of the courts are closed. From the moment that he ceases to depend upon the justice of his case and seeks discriminatory and favored

treatment, he becomes a corrupter of the Government itself and is fortunate if he loses no more than the rights he seeks to obtain."

Chief Judge Fee, discussing the misconduct of a party, said:

> "(2) The invocation of the fetish of free speech is of no avail here. In judicial proceedings there is no uncontrolled right of speech. The litigant can neither whisper to the judge nor wear placards proclaiming his unfairness. Even a defendant on trial for his life is permitted to speak only at appropriate times and places, under control of the presiding judge." *In re Portland Electric Power Co.,* 97 F. Supp. 903, l. c. 909.)

The same judge, Chief Judge Fee, in another case entitled *In re Portland Electric Power Co.,* 97 F. Supp. 895, l. c. 896, said:

> "Any pressure upon the court, or attempts to influence judges by communication outside of court, savors of an attempt to obstruct justice."

(3) The Missouri Supreme Court in its opinion in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751—wherein Mrs. Weede was a party, and Mr. Weede represented Mr. Howard and Mr. Bush, now counsel for Mr. Howard, represented Commerce Trust Company with other counsel of record herein—stated the law with reference to the duty of counsel (R. 750-751). That court and the Missouri Appeals Court have cited said Moffet case in the six cases:

Hoffman v. *Hogan,* 345 Mo. 903, l. c. 914 (disloyalty to client).

Fanchon & Marco, Inc. v. *Leahy,* 351 Mo. 428, l. c. 457 (conflicting interests and conspiracy).

Sluggett v. *Phillips,* 178 S. W. 2d 458, l. c. 462 (conflicting interests).
Pfiffner's Guardianship, 194 S. W. 2d 233, l. c. 236-237 (conflicting interests).
In re Elam, 357 Mo. 922, Bar Committee's Brief, l. c. 925 (disbarment).
In re Buder, 217 S. W. 2d 563, l. c. 574 (disbarment proceedings, conflicting interests, breach of fiduciary relations and trust duties).

In *Buder* v. *Fiske,* 174 F. 2d 260, l. c. 267, Judge Stone (C. A. 8) cited the Moffett case authority, as did the court in *Fraser* v. *Crouse,* 56 At. 2d 54, l. c. 55.

(4) In *In re Buder,* 358 Mo. 796, the Supreme Court of Missouri *en banc* cited *In re Moffett Brothers Partnership Estate,* 345 Mo. 741, as an authority disclosing that the conduct of the Missouri "special" probate judge, and the judge of the Harper County, Kansas, District Court, who permitted them so to do, and of Commerce Trust Company and of Mr. Howard, was unlawful. Said the court, l. c. 815:

> "The policy of the law, the rules of this Court, the Canons of Ethics and the adjudicated cases have long held that a lawyer can have but one client in any given matter. Not even the most versatile lawyer 'can serve two masters.' He cannot represent interests that are or may be conflicting except by express consent of all concerned given after full disclosure of all facts. The law abhors a breach of fidelity to the client's interest. *Hoffman* v. *Hogan,* 345 Mo. 903, 137 S. W. 2d 441, 446, *Moffett Bros. Partnership Estate* v. *Moffett,* 345 Mo. 741, 137 S. W. 2d 507, 511, *Rochester* v. *Gonterman* (Mo.), 49 S. W. 2d 71, *National Hollow Brake Beam Co.* v. *Bakewell,* 224 Mo. 203, 123 S. W. 561, 567. *In re Pfiffner's Guardianship* (Mo. App.), 194 S. W. 2d 233. *In re*

Conrad, 340 Mo. 582, 105 S. W. 2d 1. Supreme Court Rule 4.06. *Fiske* v. *Buder,* 125 Fed. 2d 841."

The foregoing discloses that neither Commerce Trust Company, nor its counsel, nor their confederates, subscribed to the doctrine stated by Chief Justice Cockburn as follows:

> " 'The arms which an advocate wields he ought to use as a warrior, and not as an assassin. He ought to uphold the interests of his clients *per fas,* not *per nefas.* He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice.' This knowledge must come to every man who is worthy to minister at the altar of justice and to feed its sacred and undying flame." (The Story of the Law, John M. Zane, p. 306.)

(5) Said counsel admits (R. 102) that the change resulting from the trip to Kingman (R. 114-115) of a judgment entry in favor of petitioner's sister for approximately $130,000.00 was entered on March 5, 1932, substituting Commerce Trust Company, as conclusively established by Mr. Weede's letter (R. 182-183) and affidavit (R. 241, 4th par.) which also shows said judge's dereliction.

(6) Paragraph 44 (R. 24-25), and motion to substitute amendment for paragraph 44 (R. 237-240) shows that said Judge appointed Messrs. Howard and Weede (R. 24) as a committee to take petitioner's Missouri counsel before the Ethics Committee of the Supreme Court of Kansas, for the purpose of preventing petitioner from having effective representation during the contemplated overt acts of the conspirators, one of whom was said Judge. Respondents know what said Judge and their committee did, and if there were a record showing that

the Ethics Committee ever took any action against said counsel, it is plain that Commerce Trust Company—as shown by its statements in its Point 7 on its pages 45-46—would have produced it in the record and called this Court's attention thereto. But as it was merely an intimidating overt act which accomplished its purpose, and was done in bad faith by said Judge and said respondents, it conclusively appears that said act was done by the State through its district judge, in abuse of his powers, so as to abridge petitioner's protected federal rights in her property. For petitioner was entitled to exercise her right to institute the action in the federal court in an attempt to protect her property right, and was entitled to be protected against official reprisal for having exercised it.

Bomar v. *Keyes,* 2 Cir., 162 F. 2d 136.
Picking v. *Pennsylvania R. Co.,* 3 Cir., 151 F. 2d 240.
Burt v. *City of New York,* 2 Cir., 156 F. 2d 791.
Terminiello v. *City of Chicago,* 1949, 337 U. S. 1, 69 S. Ct. 894.
Douglas v. *City of Jeanette,* 1943, 319 U. S. 157, 63 S. Ct. 882, 146 A. L. R. 81.

(7) Said Judge as a conspirator, having deprived petitioner of effective representation, made orders misappropriating the partnership lands in Kansas of Moffett Brothers, in which petitioner had a majority interest, by approving false credits (R. 22) on the void judgment entered against Commerce Trust Company (R. 20, 115-139), and to satisfy same—manifestly to further the purpose of the conspiracy and in revenge for the act of petitioner in attempting to enjoin the enforcement of his void judgment.

(8) Though absolutely without jurisdiction so to do, said Judge entered a decree (R. 370-388-395)—sitting in his Kansas court—partitioning 17,000 acres of Oklahoma lands in which petitioner owned a majority interest, notwithstanding the law as declared by the Oklahoma and Kansas Supreme Courts, and also by this Court, held such judgment void. In *Sharp* v. *Sharp,* 166 Pac. 175, the Oklahoma court said, l. c. 177:

> "Fourth. Jurisdiction to render a judgment in *rem inheres* only in the courts of the state which is the situs of the res. *Watkins* v. *Holman's Lessee,* 16 Pet. 25, 10 L. Ed. 873; *Harrison* v. *Harrison,* L. R. 8 Ch. 342; *Davis* v. *Headley,* 22 N. J. Eq. 115; *Clopton* v. *Booker,* 27 Ark. 482; *Williams* v. *Nichol,* 47 Ark. 254, 1 S. W. 243; *Winn* v. *Strickland,* 34 Fla. 610, 16 South 606; *Poindexter* v. *Burwell,* 82 Va. 507; *Cooper* v. *Ives,* 62 Kan. 395, 63 Pac. 434; *Smith* v. *Smith,* 174 Ill. 52, 50 N. E. 1083, 43 A. L. R. 403."

In *Jefferson* v. *Gallagher,* 150 Pac. 1071, the court said, l. c. 1077:

> "In *Larimer* v. *Knoyle,* 43 Kan. 344, 23 Pac. 489, that court says: 'It is well settled in this state that a judgment rendered without jurisdiction is void, absolutely and entirely, and may be shown to be void in a collateral as well as a direct proceeding, and by extrinsic evidence as well as by the evidence itself."

(9) Said Judge made orders directing Commerce Trust Company, as Missouri administrator of Moffett Brothers partnership estate, to transfer Moffett Brothers Oklahoma land to the John Moffett estate (R. 540-549) and afterward to Mrs. Weede (R. 551-559), which acts were void under the law declared in *Sharp* v. *Sharp, supra,* citing *Watkins* v. *The Lessee of Holman et al.,* 16 Pet.

25, holding that a Massachusetts administrator's deed was inoperative to transfer Alabama land, thus, l. c. 57:

> "That the deed is inoperative is clear. It was executed by the administratrix under a decree or order of the Supreme Court in Massachusetts, and by virtue of a statute of that State. The proceeding, it is not pretended, was authorized by any law of Alabama. And no principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the State where the land is situated."

Said District Judge of Harper County, Kansas, was liable had he been a party under the law stated in *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, l. c. 250:

> "The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states."

In *Snyder* v. *Massachusetts*, 291 U. S. 97, l. c. 116, Justice Cardoza said:

> "Due process requires that the proceedings shall be *fair.*"

Would not any jury have a right to draw inferences from the admitted and conceded facts—that the proceedings *could not be fair* where the same counsel represented conflicting interests, and the judge acted as above set forth?

Said Justice Roberts, in the same case, l. c. 137:

> "But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a *fair* way.

> Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of *fairness* be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was *unfair*, the result is just."

In *Weidekind* v. *Water Co.*, 74 Cal. 386, it was pointed out that where a counsel gets on both sides of a case, either at the same or different trials, then the losing party cannot have a fair trial of his case, thus, l. c. 388-389:

> "The trial court has a right and *it was its duty* to have forbidden the attorney from changing sides in the same suit though at different trials; for to do otherwise was 'to defeat the very purpose for which courts were organized, viz: the administration of justice.' * * * injury must be presumed to have resulted to the plaintiff, whereby he was *prevented from having a fair trial* of his case." (Italics ours.)

And so, petitioner was denied due process of law in the above proceedings by said Kansas State District Judge, in cooperation with respondents, in violation of the XIVth Amendment.

The District Court's opinion establishes the truth that the complaint states a cause of action. For, in referring to the charge in the complaint, its opinion contains the recital (R. 782-783):

> "In the case of '*Sullivan* v. *Felix*, 194 Fed. 88, the Court of Appeals, for the Fifth Circuit, said in reference to a similar action:
> 'We find no federal statute of limitations applicable to the case.' This case was affirmed by the Supreme Court, 233 U. S. 318. This is unfortunate for the reason that where a state or states are

> accused of oppressive discrimination, as in this case, there should be a speedy and prompt presentation of the facts as a matter of quasi public concern."

It thus appears that the District Court recognized the truth, that the complaint in this case made it a case

> " * where a state or states are accused of oppressive discrimination"

by the use of the words

> "as in this case."

In view of the fact that no State can be charged with discrimination in an action under the Civil Rights Acts —save and except through its officials and agents—and in view of the fact that the Missouri "special" probate judge and the Kansas state district judge of Harper County, and an executor and administrator, were the only officials charged in the complaint with such discrimination under the Civil Rights Acts—it necessarily follows that said statement was an affirmative finding that the complaint stated a cause of action. This statement, in itself, necessitated a reversal, instead of an affirmance, by the Court of Appeals.

The law as to limitations herein is stated in *Kansas City* v. *Rathford,* 353 Mo. 1130, l. c. 1145; and in *State ex inf. Taylor* v. *American Ins. Co.,* 355 Mo. 1053, l. c. 1118-1123.

(10) The second Judge named by Commerce Trust Company awarded Tom Moffett's Comanche County farm to Helen Weede (R. 16-17), in violation of the law of Kansas, as pointed out in Point VIII of petitioner's supporting brief on pages 47 to 49.

"Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, arises as often when judicial action is in question as in any other cases. * * *

A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.

It is a maxim in the law that consent can never confer jurisdiction: by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory."

(Cooley's Constitutional Limitations, 7th Ed., 575-576.)

And, in violation thereof, said first named judge's partition and distribution decree again awarded said Comanche Farm, along with other lands, to Helen Weede (R. 370, 386) at her request (R. 359-361, 386), evidently on the singular theory that two void judgments are equivalent to one valid judgment!!

Kansas Supreme Court Judge.

Commerce Trust Company asserts on page 46 of its brief that petitioner

> "* * * insinuates and intimates that the full bench of the Supreme Court of Kansas, and of the Circuit Court of Appeals for the Tenth Circuit, and Federal Judge Hopkins were all participants in the claimed conspiracy along with the Kansas District Judge Hay."

Its record basis for said statement contains its own language (C. 955):

> "Commerce Trust Company, in its 94 page document called 'Further and Additional Responses' filed August 27, 1948, says on pages 8c-8d of its 'Foreword':
>
> > 'Plaintiffs will not have the temerity to reduce their claims to absurdity by alleging that the full bench of the Supreme Court of Kansas and of the Circuit Court of Appeals for the Tenth Circuit, and Federal District Judge Hopkins, were all participants in the claimed conspiracy along with the Kansas District Judge Hay.'"

It thereby proves that petitioner did not so "insinuate" and "intimate," and that her claim is valid and not absurd, by stating that if petitioner made the allegations

suggested that it "would reduce" petitioner's claims "to absurdity."

Did Commerce Trust Company have reason to believe that some acts of some judge it mentions would warrant such allegations? Otherwise, why suggest it?

And now that Commerce Trust Company has so "insinuated and intimated," it is appropriate to call this Court's attention to what some judge did.

The same Justice who wrote the opinion in *Peyton* v. *Chase County National Bank,* 124 Kan. 763, January 7, 1928 (cited by him as authority long after his decision in the Moffett case, in *Wolcott & Lincoln* v. *Baker,* 155 Kan. 105, 110), quoting *State ex rel.* v. *Bradbury,* 123 Kan. 495, in both of which he personally recognized, and was fully conscious of the fact and the law, that a judgment prosecuted by a party against himself, representing conflicting interests, was, and is, void. He also wrote the opinion in *Moffett* v. *Moffett,* 131 Kan. 582, in the July term, 1930 (before Tom Moffett's death), some 18 months after writing the opinion in the Peyton case, saying, l. c. 588:

> "Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict. But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties."

He also wrote the opinion in *Clark* v. *Moffett,* 136 Kan. 711, on appeal from the state district judge's void judgments, in January term, 1933 (after Tom Moffett's death), recognizing said contention.

The conflicts so recognized by said judge as existing in the record before him were the same conflicts shown by the same record, later condemned by the Supreme Court

of Missouri in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741, l. c. 750, 751, the judgment in which is *res judicata* against respondents, and against said opinions and decisions of said Kansas Supreme Court Judge.

Said opinions and decisions, in addition to destroying petitioner's federal and property rights, conflict with the statute of wills of the State of Kansas, denying Mrs. Weede any interest in her deceased husband's estate. See petitioner's supporting brief, pages 47 to 49.

Said question was raised in the brief in the Court of Appeals in Point 9 on pages 58-71. Said statute of wills was construed in *Vanek* v. *Vanek,* 104 Kan. 624. Sections 60-3317 and 60-3330 required the Supreme Court of Kansas in any case pending before it to render such final judgment as it deems that justice requires:

> "* * * and shall send a special mandate to the court, requiring such judgment or order to be entered and that execution be awarded thereon."

That court held that said statutes compel the Supreme Court of Kansas to render a judgment in accordance with the law of Kansas (*Denlin* v. *City of Pleasanton,* 130 Kan., l. c. 773, and *Majors* v. *Seaton,* 142 Kan., l. c. 282).

Petitioner's Exhibit 4 (R. 353) is the judgment of reversal in the Vanek case, and her Exhibit 7 (R. 356-357) is the mandate of that court "with directions to render judgment for the defendants," which conclusively establishes the law of Kansas as it is declared in said statute of wills—to the effect that the childless widow of a husband who died childless and who made his will while a bachelor, and who was never the parent of any child (R. 17) has no interest in his estate in Kansas. See also *Schippel* v. *Jennerson,* 169 Kan. 151, l. c. 166, where the Kansas Supreme Court expressly ruled on Sec. 22-238,

R. S. Kan. 1923, 1935, to the same effect. (See Appendix to petition, page 33.)

It is apparent that Commerce Trust Company wondered why these facts were not called to the attention of this Court by petitioner, and hence "intimated" and "insinuated" what it untruly asserts petitioner did.

Petitioner having called attention to the fact that the judgment of the district court was void, and that an appeal from such judgment does not make it valid, did not find it necessary to discuss the acts of the judge above mentioned. For an appeal from a void judgment does not make it valid (*Revere* v. *Revere,* 133 Kan. 300, l. c. 302-303).

The Court of Appeals for the 8th circuit in *Missouri ex rel.* v. *Stormfeldz,* v. *Guaranty Title & Trust Co.,* 72 F. 2d 595, have held that an appeal from a void judgment does not make it valid. This question was raised in Point 8 of petitioner's brief in the Court of Appeals, pages 56-57, and was ignored by that court.

Even though such Justice did wrong, it was unnecessary for petitioner to call attention thereto until Commerce Trust Company here compelled her to do so.

Now, without intimation, insinuation or suggestion, the facts are here stated which compel the conclusion that both the district and supreme courts of Kansas denied petitioner's alleged federal rights through the judge of the state district court, and the Justice who wrote the opinions in the Moffett case.

It is apparent that a jury would be entitled to make some inferences from said facts as to whether or not said Justice did not knowingly deprive petitioner of her federal rights under the law declared in *Picking* v. *Pennsylvania R. Co.,* 151 F. 2d 240, l. c. 250.

Kansas Federal Court Judgments.

The dismissal of the suit to enjoin the enforcement of the judgment entry of the Harper County, Kansas, district judge was not *res judicata* because:

(1) The Federal district and appellate courts were without jurisdiction to enjoin such enforcement—that is, the proceedings in the state court—under then Section 262, Title 28, U. S. C. (*Toucey* v. *United States,* 314 U. S. 118), later overruled by Congress (Section 2283, Title 28, U. S. C.).

(2) Judge Hopkins dismissed the case without opinion May 27, 1935 (R. 784-785), on the ground stated in the order that (R. 785):

> "* questions embraced in said third amended bill in equity and the two said amendments thereto were either presented to the District Court of Harper County, Kansas, and the appellate courts in said suit, or could have been presented in said suit, * * *"

Nothing in the order of dismissal refers to a reservation with reference to an opinion. The transcript of the record was filed in the Tenth Circuit on July 9, 1935 (W. 37). The opinion was filed September 4, 1935, as appears from 14 F. Supp. 602. It was Exhibit "A" in the Appendix of respondents' brief, filed September 4, 1935.

(3) The dismissal was not on the merits, and hence the judgment of dismissal was not *res judicata.* See *Hughes* v. *United States,* 4 Wall. 232-237, where this Court held, l. c. 237:

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties,

> or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Walden* v. *Bodley,* 14 Pet. 156; 1 Greenl. Ev., secs. 529, 530, and authorities there cited."

(4) Judge Bratton affirmed on the ground that the fraud was intrinsic and not extrinsic, saying, 81 F. 2d 434:

> "The judgment was affirmed, *Clark* v. *Moffett,* 136 Kan. 711, 18 P. 2d 555. Certiorari was denied (290 U. S. 642, 54 S. Ct. 61, 78 L. Ed. 558) and motion for leave to file petition for rehearing was likewise denied, 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528."

(5) None of these respondents were parties to the injunction suit in the Federal courts in Kansas, and as Robbins was separately liable as a conspirator, even had there been a judgment on the merits in his favor, it could not be *res judicata* as to the respondents or any one of them (*Bomar* v. *Keyes,* 162 F. 2d 136, citing *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111).

(6) Said judgments of said Federal courts were pleaded as *res judicata* in the Howard fee case, 345 Mo. 741-751, by the respondents there where, in the record before the Supreme Court of Missouri in said case, they were denied any *res judicata* or full faith and credit effect, as were the judgments sought to be enjoined. And, as the judgment in 345 Mo. 741-751 was the last judgment, it controls.

(7) The verified allegations contained in Mr. Weede's Exhibit 1 (W. 36-261) constitutes evidence tending to establish the truth of the allegations of the complaint. (Greenleaf on Evidence, 14th Ed., Section 201) and must

be considered by the jury under the rule that all parts of a statement must be construed by the jury, which rule is well stated in said section as follows:

> "* * * it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him."

Kansas Federal Judges.

As to the opinions of District Judge Hopkins, and of Judge Bratton of the court of appeals for the tenth circuit, these respondents have not mentioned the fact that no party here was a party to the injunction suit to stay proceedings on the void Kansas judgment entry in the federal court in Kansas, and that their claims that the decision that the fraud was "intrinsic" is *res judicata* as to them is contradicted as to this civil rights action by *Bomar* v. *Keyes,* 162 F. 2d 136, where Judge Learned Hand, citing *Bigelow* v. *Mining Co.,* 225 U. S. 111, held that the complaint stated a cause of action under the Civil Rights Acts against one conspirator which was not barred by the failure of a ministerial proceeding or a court action against a joint wrongdoer, l. c. 140:

> "* * * because Keyes was not a party either to the proceeding or to the action; and, being a tort feasor with the Board and liable separately, she was not a 'privy' to the judgment in its favor."

Said Federal judges were also without jurisdiction to enjoin proceedings in a state court (*Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118-154).

Nor did said judges have before them the opinion in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751, announced March 6, 1940, some 5 years after the fail-

ure to obtain relief in the injunction suit in the Kansas Federal Court in 1934-1935 in the vain effort to prohibit proceedings resulting in the loss of petitioner's property.

Though it appeared from the bill that the judgment against Commerce Trust Company, as Missouri administrator of Moffett Brothers partnership estate (R. 20-21), was void, and though it also appeared that Commerce Trust Company, as executor of John Moffett's estate, through its attorney, Mr. Howard, offered the evidence which resulted in a judgment against his other client (R. 48, 699—Commerce Trust Company, as Missouri administrator of Moffett Brothers partnership estate—yet Judge Bratton in *Moffett* v. *Robbins,* 81 F. 2d 431, failed to give effect to the decisions of this Court, and of the Supreme Courts of Missouri and Kansas in that case—which Kansas decisions and opinions he later cited in *Yager* v. *Liberty Royalties Corporation,* 123 F. 2d 44, as correctly stating the law which should have been applied by him, but was evidently overlooked by him.

His opinion as to this question follows at l. c. 435-436 of 81 F. 2d:

> "It is equally well settled by the decisions of this court and others that a United States court cannot vacate a judgment or decree of a state court, nor mandate that court to do so.
>
> * * * * * * *
>
> But such relief will be granted only upon fraud extrinsic to the matters tried and determined by the other court and which caused the court to render a wrong judgment, such as the successful party through fraud or deception preventing the unsuccessful from presenting his case, or from attending the trial, *or where his attorney was induced to betray his client's interest, or other chicanery of that kind.* The submission of perjured testimony or a fraudulent instrument on which the judgment rests is not enough, be-

> cause a matter of that kind is necessarily *intrinsic* the proceedings. *United States* v. *Throckmorton,* 98 U. S. 61, 25 L. Ed. 93; *Luikart* v. *Farmers' Lumber Co.* (C. C. A.), 38 F. (2d) 588. In order to come within the rule, it must appear by clear allegations of fact that the party asserting it had a valid defense to the cause of action on which the judgment was rendered; that he was prevented by *extrinsic* fraud, accident, mistake, concealment, or other chicanery from presenting such defense, and that he had not been negligent of availing himself of it." (Citing cases.)

Nevertheless, he applied an obsolete rule as to intrinsic and extrinsic fraud, contrary to the opinion of this Court in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 328, cited in *Sutter* v. *Easterly,* 189 S. W. 2d 284, 162 A. L. R. 437.

Of course, neither Judge Hopkins nor Bratton had the same advantage as did the Court of Appeals or the District Court herein, which had the decision and opinion of the Supreme Court of Missouri in *In re Partnership of Moffett Brothers,* 345 Mo. 741-751, in which that court denied *res judicata* and full faith and credit to Judge Hopkins and Bratton's opinions and decisions—holding that Commerce Trust Company and its attorney, B. C. Howard, were guilty of obtaining judgments by representing conflicting interests (R. 699, 701). Said judgments, by virtue of facts found in said cases, are void both under the decisions of Kansas and Missouri and this Court.

Nor did the Supreme Court of Kansas, nor Judge Bratton of the Tenth Circuit have the benefit of the finding set forth in the decision and opinion of the Supreme Court of Missouri to the effect that Commerce Trust Company, as executor of the John Moffett estate, paid B. C. Howard $6,000.00 (R. 25, 700) for betraying his

other client, Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate—knowledge of which fact would have compelled said Federal Courts to enjoin the execution of the void judgment, under the law stated by Judge Bratton, if it were not for the decision in the Toucey case (314 U. S. 118). For the payment of said sum to Mr. Howard was an extrinsic fact which must have resulted in accordance with the rule stated by Judge Bratton as to intrinsic and extrinsic fraud.

The opinion in the Howard fee case (R. 692-701) shows that Mr. Howard was paid $6,000.00 (R. 700-701) by Commerce Trust Company as executor for his misrepresentation of Commerce Trust Company as administrator —which fact did not appear in the record before Judges Hopkins and Bratton, who found that respondents' fraud was "intrinsic."

It is not alleged in Mr. Weede's Exhibit 1 (W. 36-261) that said district judge of Harper County was a conspirator with the others in that case, nor is it alleged therein, nor could it have been, that Mr. Howard was thereafter paid by Commerce Trust Company, as executor of the John Moffett estate, to betray Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate—and incidentally petitioner as beneficiary of Moffett Brothers partnership estate—by offering the false testimony manufactured by respondents (R. 23-24, 699) against Commerce Trust Company as administrator of, and petitioner as majority owner of, Moffett Brothers partnership estate.

And so, said Federal Court decisions fall of their own weight.

In *American Ins. Co.* v. *Lucas,* 38 F. Supp. 926 (affirmed 129 F. 2d 143 [C. A. 8], certiorari denied 317

U. S. 687, rehearing denied 317 U. S. 712) the court, consisting of three judges, thus declared the law, l. c. 930:

> "That the bribery here involved would be such 'extrinsic' fraud is certain. *Barrett* v. *Kunkel,* 8 Cir., 259 F. 394."

In *Barrett* v. *Kunkel, supra,* the Court of Appeals for the 8th Circuit said:

> "The cross bill and the offer of proof show that Hannah Bennett's attorney Crump, while purporting to act as her counsel, in securing the approval of the deed, and in causing a decree to be entered in her case against Semmes and Litchfield, forever barring her right to the property, was in fact acting on behalf of Litchfield, *and upon a consideration paid him,* and that Hannah was wholly ignorant of what was going on when the deed was approved * * * *One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his bargain. Alger* v. *Anderson,* 78 Fed. 729, and cases there cited." (Italics ours.)

The only judges who were charged with being parties to the conspiracy were the Missouri "special" probate judge, and the Judge of the District Court of Harper County, Kansas. What these judges did, and the loss they occasioned pursuant to the conspiracy, was, and is, in itself sufficient to give jurisdiction to the District Court and Court of Appeals, and to this Court, to grant the relief sought for the loss resulting from all the overt acts.

Of the other questions, whether they are questions of state or federal law, since they are part of the same cause of action, they authorize recovery herein against respondents for the total damage, under the principle stated

in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 174, this Court said:

> "The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, * * * "

And in view of the fact that the dropping of the six words "or for any error in fact" from Section 1011 R. S. U. S. has reinvested the appellate jurisdiction of this Court as to the facts, under the opinion of Judge Holmes in *Sunray Oil Co.* v. *Allbritten*, 188 F. 2d 751, l. c. 756, then this Court, having appellate jurisdiction as to the facts under the provisions of Section 2106, Title 28, U. S. C., is authorized to enter a judgment for the full amount prayed for in petitioner's complaint, together with her costs.

The fact that Commerce Trust Company has been permitted by the courts to wreak its will upon petitioner and her deceased husband warrants the conclusion that the same situation exists in the heart of the United States as that depicted by Sir William Holdsworth in his Tagore Lectures at Calcutta in the year 1938:

> "In 1440 Mr. Justice Paston strongly advised a friend not to go to law with one who had the support of the Duke of Norfolk. 'For if thou do, thou shalt have the worse, be thy cause never so true, for he is in the pay of my lord of Norfolk, and much is of his counsel; and also thou canst get no man of law in Norfolk or Suffolk to be with thee against him; and therefore my counsel is, that thou make an end whatsoever thou pay, for he shall else undo thee and bring thee to nought.' "

Missouri's Probate Judge.

The wrongdoing acts of the probate judge of Jackson County were alleged (R. 27) without naming him. He made the order (R. 421-422) for the sale of the Kansas Hymer Ranch (R. 423-424), which was never owned by John Moffett or his estate (R. 417, 419, 155-156, 190-194), by Commerce Trust Company as Missouri executor, and the order for the transfer of the Oklahoma lands by Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate (R. 540-549). The only thing wrong with said orders—sought and obtained by Commerce Trust Company (R. 540)—was that under the laws of Missouri, Kansas and Oklahoma, and under the law declared by this Court (*Clarke* v. *Clarke,* 178 U. S. 186)—said orders authorizing the transfer of lands in States other than Missouri were void, and gave no authority to Commerce Trust Company to "sport away" petitioner's vested rights, as declared in the rule stated by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch. 137, l. c. 166; and as pointed out by the Supreme Court of Missouri in *Partnership of Henry Ames & Co.,* 52 Mo. 290, where it is said, l. c. 293-294:

> "The law seems to be well settled, that an administrator has no authority to transfer assets, except such as have their *situs* within the territorial limits of the Government granting his letters.
>
> This point was determined by this Court in *McCarty* v. *Hall,* 13 Mo. 480, where the authorities were reviewed at some length, and we see no reason for departing from the doctrines laid down in that case. See also *Naylor's admr.* v. *Moffat,* 29 Mo. 126; *Minor* v. *Cardwell,* 37 Mo. 350."

Missouri expressly holds, in *Bank of Seneca* v. *Morrison,* 200 Mo. App. 169, such an order of a Missouri probate court void, saying, l. c. 178:

> " * * * said order is void for the reason that the land respecting which the order was made is not in this State. The power of the administratrix as such did not extend beyond the boundaries of this State. As administratrix here she had no power or authority over property in Oklahoma belonging to her intestate."

Said opinion cites many cases involving partnership and other estates in other states.

In *Pinet* v. *Pinet,* 239 Mo. App. 500, l. c. 505, as recently as December 1945, the Missouri appellate court said:

> "Our courts have uniformly held that debts due from a Missouri debtor to a nonresident decedent are *assets* in Missouri. (*In re Estate of Henry Ames,* 52 Mo. 290; *McCarty* v. *Hall,* 13 Mo. 480; *Becraft* v. *Lewis,* 41 Mo. App. 456; *Miller* v. *Hoover,* 121 Mo. App. 568; *Crohn* v. *Clay County Bank,* 137 Mo. App. 712; *Harnett* v. *Langan,* 282 Mo. 471, 490.)"

Referring to *McCarty* v. *Hall, supra,* the opinion proceeds, l. c. 505:

> "The court quotes with approval pertinent language from a decision of the Supreme Court of Massachusetts in *Jones* v. *Godwin,* 3 Mass. R. 514; 'Debts due the testator, at the time of his death, from persons residing in other states, are placed by law on the same ground as goods and chattels belonging to him and *being in another state.* Over these she, as executrix, deriving her authority under the law of Massachusetts, has no control.' "

In *Johnson* v. *Powers,* 139 U. S. 156, l. c. 158, this Court held that an administrator appointed in Michigan could not function in a New York court, State or Federal, thus:

"The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect, because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either state or national, held in any other State. *Stacey* v. *Thrasher*, 47 U. S. 6 How. 44, 58 (12:337, 342); *Noonan* v. *Bradley*, 76 U. S. 9 Wall. 394 (19:757)."

Kansas similarly ruled in *National Bank of Topeka* v. *Mitchell*, 154 Kan. 276, emphatically citing *Brown* v. *Fletcher's Estate*, 210 M. D. 82-95, 52 L. Ed. 966, holding that the Kansas statute, Section 22-1308, R. S. Kan. 1923, 1935, did not vest authority in a Kansas court to render a judgment against a nonresident executor or administrator, notwithstanding said statute—on the same principle as a like statute was held void in *McMaster* v. *Gould*, 240 N. Y. 379.

Yet Commerce Trust Company claims that petitioner should not call this Court's attention to the void orders made by judges, which in and of themselves, together with Commerce Trust Company's acts pursuant to the conspiracy, deprived petitioner of her rights in said real estate, and personalty directly contrary of the command of Sections 41 and 42, Title 8, U. S. C., and the constitutional provisions alleged in the second amended complaint.

Jackson County Judges.

(1) Commerce Trust Company asserts that the application for injunction (R. 736-751) charges the Circuit Court of Jackson County, Missouri, with discrimination.

If so, the following prayer should have been granted (R. 751):

> "Wherefore appellant respectfully prays that this Court give effect to the law of the United States, which is supplemented by Sections 2283, 1651 and 451, Title 28, U. S. C., by issuing its writ of injunction in aid of the jurisdiction of this Court, and enjoining the further proceedings in said state court until the final decision of the above entitled cause on its merits."

For it appears that cause No. 339,134, filed October 25, 1930 (R. 292), has in violation of Section 10 of Article II of the Missouri Constitution of 1875, duplicated in Section 14 of Article I in the Missouri Constitution of 1945, ever since been kept on the docket and is now on said docket of said court.

Said failure to revive in Missouri, as shown by the opinions in *Merchants Mutual Ins. Co.* v. *Hill,* 17 Mo. App. 501, *Hartvedt* v. *Maurer,* 359 Mo. 16, *Zuckerman* v. *McCully,* 170 F. 2d 1015, l. c. 1018, has exactly the same legal effect as the failure to revive in this Court had in *Anderson* v. *Yungkau,* 329 U. S. 482. That is, the case is ended.

This is one of the questions presented to this Court, embodied in specification of error (17) on page 18 of petition for writ of certiorari.

As to the Circuit Court of Jackson County, Missouri, Commerce Trust Company states that (pp. 45-46):

> " • • • petitioner alleges that on four occasions between August 23, 1943, and December 20, 1949, the judges of the Circuit Court of Jackson County intentionally and purposefully discriminated against her."

If this be true, then the allegation accords with the re-

quirements of *Snowden* v. *Hughes,* 321 U. S. 1, and warrants reversal of the denial of injunction (R. 763, 767) to protect its own jurisdiction by the Court of Appeals.

V.

The judgment of the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, was not on the merits, and is therefore not *res judicata* as to either party hereto.

Respondents assert that the judgment in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, is *res judicata* of the issues herein. They have, however, not shown the court that all that the state court had decided, was that three petitions were held to be insufficient on ground of misjoinder of parties, and that, therefore, under a statute of that state, Sec. 948, R. S. Mo. 1939, the case must be dismissed. Such decision is not on the merits and authorizes the institution of a new suit or action in the State or Federal Court. Said statute is as follows:

> "If a third petition, answer or reply be filed and adjudged insufficient as above, or the whole or some part thereof be stricken out, the party filing such pleading shall pay treble costs; and no further petition, answer or reply shall be filed, but judgment shall be rendered. R. S. 1929, sec. 796; * * * 1889, sec. 2068."

In *Gordon* v. *Burris,* 125 Mo. 39, construing said Section 948, it is said, l. c. 41-42:

> "Section 2068, Revised Statutes, 1889, provides: 'If a third petition * * * be filed and adjudged insufficient as above, or the whole or some part thereof be stricken out, the party filing such pleading shall pay treble costs; and no further petition * * * shall be filed, but judgment shall be rendered.'

This section was passed on in *Beardslee* v. *Morgner,* 73 Mo. 22, and its provisions held it to be *mandatory,* leaving no discretion to be exercised by the trial court.

That section contains *no exceptions whatever* in regard to contests over *wills.* It applies to every variety of civil action where pleadings in usual form are filed in the Circuit Court.

As the party in default because of having filed *three* defective pleadings is required to pay treble costs, it is to be presumed that judgment is to be rendered for such costs. But there is no intimation in the section that a judgment is to be rendered on the *merits,* or that such judgment shall be a *bar* to any future proceedings involving the same facts.

Nor is there any intimation in the section under discussion that any evidence can be heard after the disposition of the third defective petition. At that point the section says: '*But judgment shall be rendered.' What* judgment? Evidently a judgment for treble costs, for that is all the section allows or alludes to."

In *State ex rel.* v. *McQuillen,* 246 Mo. 674, l. c. 690, following *Gordon* v. *Burris* the court *en banc* pointed out:

"• • • that the provision that judgment should be rendered when a third petition is adjudged insufficient, means a judgment for costs. The court says: 'But there is no intimation in the section that a judgment is to be rendered on the merits, or that such judgment should be a bar to any further proceedings involving the same facts.' "

The first paragraph of the opinion in *Moffett* v. *Commerce Trust Co.,* 354 Mo. 1098, reads, l. c. 1124:

"On December 30, 1944, Judge Ridge, Presiding Judge and Judge of Division Six of the Circuit Court of Jackson County, sustained separate demurrers

filed by the various defendants to plaintiff's fifth amended petition on the ground of misjoinder of parties plaintiff and, finding that a third petition of plaintiffs' had been found insufficient on said ground, dismissed the petition and rendered judgrent against plaintiffs for treble costs under Section 948, Revised Statutes Missouri 1939 (Mo. R. S. A.) From that judgment plaintiffs have appealed."

Paragraph 52 of the complaint (R. 29-30) alleges:

"• • • On Saturday, December 30, 1944, said state action was dismissed by said Circuit Court on the ground of misjoinder of parties plaintiff. On appeal to the Supreme Court of Missouri said judgment was affirmed."

Paragraph 53 of the complaint (R. 30-31) alleges:

"The dismissal of said cause on December 30, 1944, and at the November term of said court, was not on the merits, and the laws of the State authorized the reinstitution of said action."

Plaintiff (petitioner here) by appealing to this Court asserted that federal questions were involved in said decision, but this Court in its opinion in 329 U. S. 669, stated:

"The motion to dismiss is granted, and the appeal is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a nonfederal ground adequate to support it."

If there were federal questions involved in said decision in the Supreme Court of Missouri, then, under the rule stated in *Angel* v. *Bullington*, 330 U. S. 183, its finding discloses the contrary.

So that, the reasons given in *Angel* v. *Bullington* for preventing a new suit in the Federal Court after the Supreme Court of the State had affirmed a judgment, do not apply here.

And, in any event, the law of Missouri as stated in *Gordon* v. *Burris, supra,* prevents respondents from successfully claiming that such decision is, or could be, *res judicata,* because it was not on the merits. And, under the law of the State, as petitioner was entitled to file a new suit in the state court, she was likewise entitled to file a new suit in the Federal Court. This is upon the assumption that a Civil Rights case, based on the Acts of Congress, may be brought in the state court and in any Federal Court.

But the claim is that the dismissal of the appeal renders the decision *res judicata* of the issues in this case.

Respondents also claim that the orders of this Court denying certiorari are *jes judicata,* notwithstanding they rely upon the opinion of this Court in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 1, expressly holding to the contrary.

Section 948, R. S. Mo., 1939, was applied by the Missouri courts in the above entitled case, and the forgoing decisions construing said Missouri statute and applying the Missouri law is controlling in this case by virtue of Section 1652, Title 28, U. S. C., which is as follows:

> "Sec. 1652. State laws as rules of decision. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

VI.

The acts of state judges alleged to be conspirators in the complaint, in addition to depriving petitioner of her property, also denied to her the equal protection of the laws.

The legal effect of said acts of said judges is well stated in *Yick Wo* v. *Hopkins,* 118 U. S. 356, l. c. 373-374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The property protected by the XIVth Amendment includes not only the thing owned, but the right to acquire, use and dispose of it (*Buchanan* v. *Warley,* 245 U. S. 60).

VII.

The void judgments and orders alleged in the complaint, and claimed to be *res judicata* in respondents' briefs, were the means by which Missouri, Kansas and Oklahoma, through the conspirators, violated petitioner's federal rights and caused the damage sustained and created the cause of action alleged.

Conspirators who, through groundless actions (R. 9-14), deprive another of his or her property rights, secured by a Federal statute, subjects the conspirators to civil and criminal liability.

In *Nixon* v. *United States,* 289 Fed. 177 (C. A. 9), the Court cited and quoted *Waddell* v. *United States,* 112 U. S. 76, pointing out that an indictment wherein the overt acts alone consisted of groundless and fictitious

suits, to deprive a homesteader of his homestead, warranted the conviction of defendants. Syllabus 6 shortly states the gist of the opinion:

> "In a prosecution for conspiracy to injure a homestead entryman in the exercise of his rights, evidence that defendants, claiming as purchasers at a foreclosure sale of a mortgage executed by the homestead claimant before final proof did everything in their power, even to the point of ousting him from possession, to prevent him from consummating his entry by final proof, *and that they resorted to legal proceedings, and procured several writs of assistance, and forced the homestead entryman to defend his possession in various courts,* held sufficient to warrant their conviction under Criminal Code Sec. 19." (Now Section 241, Title 18, U. S. C.) Certiorari denied, 263 U. S. 703.

The state court groundless actions there involved appears in the opinions in *Williams* v. *Sherman,* 212 Pac. 971, 205 Pac. 259, 199 Pac. 646.

Since the litigation there involved, which consisted of only 3 groundless and fictitious actions, when alleged in an indictment, were sufficient to constitute a cause of action in a criminal case, it would seem that the allegations in the dismissed complaint did state a cause of action in a civil case against these respondents.

Williams v. *Sherman,* 212 Pac. 271, referred to as one of the groundless legal proceedings the institution of which sustained the conviction of the defendants in that case, points out that the judgments obtained in those courts were void, just as were the judgments and orders obtained by Commerce Trust Company and Mrs. Weede in the Kansas and Missouri Courts. Said the court:

> "Where courts are without jurisdiction of the sub-

ject matter to act, their proceedings are absolutely void. They constitute no justification and all concerned in them are trespassers. *Elliott* v. *Peirsol,* 1 Pet. 328; *Lessee of Hickey* v. *Stewart,* 3 How. 750; 1 Black on Judgments, 2d Ed., sec. 218; *Ex parte Gardner,* 22 Nev. 280, 3 Pac. 570; 7 R. C. L. 1042 * * * if want of jurisdiction goes to the subject matter of the action, it cannot be waived, and, the judgment being void, it is the duty of the court to recognize its want of jurisdiction over the subject matter even when no objection is made, and to decline taking further action whenever such want of jurisdiction is made to appear." Freeman on Judgments, 120.

"* * * because jurisdiction over the subject matter of the action can never be waived, and cannot be acquired by consent, there are numerous authorities which hold that want of jurisdiction over the subject matter may be shown by evidence dehors the record, 15 C. J. 832, sec. 149 * * * *Dow* v. *Johnson,* 100 U. S. 158; *O'Ferguson* v. *Crawford,* 70 N. Y. 253."

In *Roberts* v. *United States,* 283 Fed. 960 (C. A. 8), it is said:

"Indictments under penal code 19 for conspiracy to injure persons in the exercise of civil rights which charged that defendants conspired to prevent persons named from acquiring title to land under the Homestead Law, by *instigating fictitious contests and by interfering with the occupation and improvement of the land as set out,* held sufficient."

Cited in annotation to *Screws* v. *United States,* 162 A. L. R. 1330, l. c. 1395.

Said Nixon and Roberts convictions were based on the law declared by this Court in *Waddell* v. *United States,* 112 U. S. 76, approved by this Court in *Williams* v.

United States, No. 26, October Term 1950, 341 U. S. Preliminary Print, p. 80.

Section 42, Title 8, U. S. C., as absolutely vested the rights of petitioner and her testator as citizens of the United States, as the homestead law vested their property rights in homesteaders.

Said Section 42, Title 8, U. S. C., *Oyama* v. *California,* 332 U. S. 633; *Hurd* v. *Hodge,* 334 U. S. 24; *Williams* v. *United States,* No. 26, *supra;* and *Shelley* v. *Kraemer,* 334 U. S. 1, are discussed in petitioner's supporting brief on pages 24 to 29.

Since petitioner's property rights were guaranteed by Section 42, Title 8, U. S. C., and by the XIVth Amendment in which it is embodied and Clause 1, Section 2, Art. IV of the Federal Constitution, then, even had the courts had jurisdiction of the subject matter, yet their judgments were void under the law as declared by this Court in *The Lessee of Hickey et al.* v. *Stewart et al.,* 3 How. 750, l. c. 763, where it is said:

> "From the view we have taken of the whole subject, it is our opinion the decree of the Supreme Court of Mississippi would have been no bar to the action of the plaintiffs in this case, if the subject matter of the suit had been within its jurisdiction. But we are of the opinion that court had no jurisdiction of the subject matter, and that the whole proceeding is a nullity."

The decision of the Court of Appeals conflicts with the decision of this Court in *Fairweather* v. *Ritch,* 195 U. S. 276, where this Court held that giving effect to state court judgments, if due process was denied in the state courts, gave this Court jurisdiction to grant relief. This Court said, l. c. 299:

"Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights,—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified,—a case is presented coming directly within the decision in 166 U. S. 226, 41 L. ed. 979, 17 Sup Ct. Rep. 581. Giving effect in the circuit court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts."

VIII.

The Acts of Congress, insofar as they purport to empower this Court to make the exceptions and regulations which the last sentence of paragraph 2 of Section 2 of Article III of the Constitution empowered Congress to make, are void because of conflict between the Constitution and said Acts.

The words in Section 2 of Article III of the Constitution providing

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the *Congress* shall make"

could not be changed by Section 1254 (1), Title 28, U. S. C., nor by the Acts of February 13, 1925 (43 Stat. at Large 936), or March 3, 1891 (Ch. 517, 26 Stat. 826, 828), to read

> In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Facts, with such Exceptions, and under such Regulations as the *Supreme Court* shall make.

Rule 38 (5) is based on said void acts. It is:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered."

By said rule, and said void acts of Congress, the above quoted provision of the Constitution has been made to read:

> In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the *Supreme Court in its discretion* shall make.

The 5 italicized words in said last quotation compel recital of Chief Justice Coke's prayer:

> "God send me never to live under the law of convenience or *discretion.*" (2 Rushworth's Collections 4.)

In *Yick Wo* v. *Hopkins,* 118 U. S. 346, at l. c. 370, it is held that no fundamental right of any human being can be at the mercy or discretion of any man or tribunal. Thus:

> "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of

> the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' *For, the very idea that one man be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*" (Italics ours.)

The principle so expressed in Coke's prayer, and in *Yick Wo* v. *Hopkins,* as to judicial discretion, is expressed in *Cary* v. *Curtis,* 3 Howard 236, l. c. 245, thus:

> "Second, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the *judicial* over the legislative branch of the government, *and to give the former powers limited by its own discretion merely.*" (Italics ours.)

Justice Iredell, in *Chisholm, Ex'r,* v. *Georgia,* delivered a dissenting opinion. In *Williams* v. *United States,* 289 U. S. 553, and in many other cases, this Court has approved the luminous dissenting opinion of that great Justice, wherein he discussed the effect of an act of Congress as to judicial power exceeding legislative authority. Thus, l. c. 433:

> "Upon this authority there is, that I know, but one limit; that is, 'that they shall not exceed their authority.' If they do, I have no hesitation to say, that any act to that effect would be utterly void, because it would be inconsistent with the constitution, which is a fundamental law paramount to all others, which we are not only bound to consult, but sworn to observe; and, therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference."

And so the Acts of Congress of March 3, 1891 (Ch. 517, 26 Stat. 826, 828), and of February 13, 1925 (43 Stat. at Large 936), and Section 1254, Title 28, U. S. C., attempting, in violation of the Constitution, to vest discretion in this Court to make exceptions to the appellate jurisdiction vested in it by said provision of the Constitution—if they could be held to mean what respondents contend—then, as to the discretionary feature thereof, if any, are in direct conflict with said constitutional provision, and necessarily and absolutely void as to said feature of said statutes, which must be ignored and the valid feature given effect in accordance with the provisions of 62 Stat. 991, adopted June 25, 1948:

> "If any part of Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby."

Congress could not delegate the power vested in it by the words in the last sentence of Clause 2 of Section 2 of Article III

> " • • • with such exceptions, and under such regulations as the Congress shall make"

by the statutes authorizing review on certiorari to this

Court to make the exceptions to the appellate jurisdiction vested in this Court by the Constitution, because said exceptions could only be made by Congress.

The distinction between obligatory jurisdiction and discretionary jurisdiction is equivalent to the distinction between that which is, and that which is not. That is to say, this Court has obligatory appellate jurisdiction of this case which is conferred upon it by the Constitution and the statute authorizing petitioner to bring the case here. But, since discretionary appellate jurisdiction does not exist in this Court—nor did Congress have power to give it to this Court—then that discretionary feature of the statute must be held invalid, or not to include such discretionary feature, under the rule illustrated by statements of this Court.

In *The Abby Dodge* v. *United States*, 223 U. S. 166, it is said, l. c. 175:

> "In view of the clear distinction between state and national power on the subject, long settled at the time the act was passed, and the rule of construction just stated, we are of opinion that its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate, and, therefore, be held not to embrace that which was not within such power."

The rule stated in *Dorchy* v. *Kansas*, 264 U. S. l. c. 289-290, applies:

> "A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand, if separable from the bad. *Berea College* v. *Kentucky*, 211 U. S. 45, 54-56, 53 L. ed. 81, 85, 86, 29 Sup. Ct. Rep. 33; *Carey* v. *South Dakota*, 250 U. S. 118, 121, 63 L. ed. 886, 888, 39 Sup. Ct. Rep. 403."

That Congress intended this construction is established by its enactment of the provision with reference to this very Section 1254, Title 28, U. S. C., for, enacted with it and with reference to it, and effective at the same time, Congress also enacted the statute (62 Stat. 991) above quoted.

The intention of the Congress in enacting said statutes could not have been to directly violate the Constitution, or to authorize this Court to do so, but it was to enable this Court to exercise the appellate jurisdiction vested in it by the Constitutioon, in this case and like cases.

It also recognized that some provisions in the Act might be held void, and said statute conclusively established the intention of Congress, in such event, that this Court would hold that the Constitution and this feature of the statutes enabling this Court to exercise its appellate jurisdiction should govern.

In *Crowell* v. *Benson,* 285 U. S. 22-95, this Court, construing a similar statute, held that such a statute always evidences an intention of the Congress which must be given effect, saying, l. c. 63:

> "We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged."

The suggestion is in Commerce Trust Company's brief pages 75-77, that because this question has never been raised, then the silence of "quiescent years" settles it. But this Court in *Fairbank* v. *United States,* 181 U. S. 283, settles this question against respondents.

This case could not be reviewed by appeal, but only by certiorari under the present acts of Congress. Said acts are void insofar as they undertake to vest discretionary power in this Court to except this case from the appellate jurisdiction of this Court, since the Constitution gives that power to Congress alone.

The only response respondents can make is that because said acts have never been questioned, then their validity is settled by "the verdict of quiescent years." In other words, that because this Court has obeyed said statutes, which it has never held valid, but which respondents assert this Court has applied, establishes their constitutionality.

This contention is answered by the opinion in *Fairbank* v. *United States,* 181 U. S. 283, where this Court, giving full effect as to the law, declared in *Marbury* v. *Madison,* 1 Cranch. 137, and *McCulloch* v. *Maryland,* 4 Wheat. 316, l. c. 289:

> "If the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed."

In said opinion the Court also discussed the question of contemporaneous construction, quoting Justice Mathews as follows, l. c. 310,

> "The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt."

and concluded by holding the Act of Congress invalid because of conflict with the Constitution.

The extent of the practical construction there involved, and the weight to be given to it, was well stated in the dissenting opinion of four of the Justices, as follows, l. c. 323:

> "Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the government, without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented."

Section 1254 has been in effect since September 1, 1948. The Act of 1925 was in effect since February 13, 1925. The Act of 1891 had been in effect since March 3, 1891, according to the article of Chief Justice Taft in 35 Yale Law Review, page 1.

And so, under the rule applied in *Fairbank* v. *United States, supra,* if 112 years be not sufficient to give validity to a void act of Congress, then certainly a lesser number, whether 3, or 25, or 60 cannot be sufficient.

Long years ago this Government was represented by the late Justice McReynolds as attorney general, who, on June 9, 1913, filed a motion to advance and place on the summary docket the case of *Weeks* v. *United States,* No. 976, October Term 1912 (232 U. S. 383). Later the case was submitted by Solicitor General Davis on the ground that the question involved was absolutely foreclosed by a prior decision of this Court in *Adams* v. *New York,* 192 U. S. 585. A question as to the Court's discretion was dis-

cussed, as it has been discussed herein, on pages 53-55 of the brief of that plaintiff in error, and decided against the Government in favor of Weeks.

The question there involved had never been theretofore decided by this Court, as the question here involved with reference to these void acts of Congress has never heretofore been decided by this Court.

The decision in that case, on the question of discretion, is authority against respondents herein on said issues.

Said discussion as to the discretion of this Court in Weeks' brief, pages 53-55, is substantially duplicated on pages 66-68 of petitioner's supporting brief. The distinguished gentlemen named above did not think that questioning the Court's right to affect the rights of the plaintiff in error in that case by its judicial discretion was any reflection on the Court or its members, as do respondents herein.

Had that case been limited to review on certiorari, in accordance with Rule 38, then, since there was no conflict between the judgment there and any particular ruling of this Court, or any court of appeals, or any state court, the case could never have been reviewed by this Court. And so the decision in said case, and its record, establishes that the acts of Congress as to review on certiorari hinder the progress of the law.

Cooley on Constitutional Limitations, 7th Ed., p. 163, states:

> "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign authority of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wis-

dom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

> "1. These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every Commonwealth, in all forms of government;
>
> First. They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.
>
> • • • • • •
>
> Fourthly. The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have. • • • Locke on Civil Government, Sec 142."

Said Acts of Congress and said Rule constitute a mere unauthorized mechanism for keeping this case out of court. Three Justices of this Court have stated (350 U. S., l. c. 227) that they constitute

> "• • • a mechanism for keeping cases out of this Court."

One of the Justices joining in the opinion found that it was unsatisfactory by the language:

> "Mr. Justice Jackson, being of the opinion that this is the better of the two unsatisfactory courses open to us, joins this opinion." (l. c. 238.)

The mechanism provided by the *Constitution* for keeping cases out of this Court consisted of the words

> "* * * with such Exceptions, and under such Regulations *as the Congress shall make.*"

Congress could not shirk its absolute legislative duty to make exceptions to the appellate jurisdiction of this Court by enacting said void statutes, nor thereby relieve itself from the burden of making such exceptions, nor thereby place same on this Court, for the specification of the department of the Government which should make the exceptions in the Constitution prevented any other, including this, from making the constitutionally designated exceptions. And this because said language of the Constitution vested in the Congress alone powers which are strictly and exclusively legislative.

In *Wayman* v. *Southard,* 10 Wheat. 1, Chief Justice Marshall said, l. c. 43-44:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative."

The appellate jurisdiction so vested in this Court by the Constitution could not be thus taken away by the Congress. In *Stevenson* v. *Fain,* 195 U. S. 165, Justice Fuller said, l. c. 167:

> "The Supreme Court alone 'possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it' (*United States* v. *Hudson,* 7 Cranch. 32, 3 L. ed. 259)."

Congress could not delegate its own function to this Court to deprive this Court of the jurisdiction vested in

it by the Constitution. For the Constitution vested that power in Congress alone, and thereby denied it to this Court. So that the Acts aforesaid, purporting to authorize this Court to exercise its discretion to determine whether or not it should except this case from the appellate jurisdiction of this Court, were void.

As this case has been lawfully brought before this Court within the meaning of the phrase

> "* * * lawfully brought before it for review"

in Section 2106, Title 28, U. S. C., then it is not only empowered, but it is its constitutional duty, to take jurisdiction of this case by granting the writ prayed for, and reversing the erroneous judgments of the lower courts.

The Constitution did not confer any authority upon the Congress to enact the said void acts substituting this Court's discretion to make the exceptions to the appellate jurisdiction of this Court which the Constitution declared should be made by Congress, and by Congress only. And so the law as declared by Justice Miller in *United States* v. *Germaine,* 99 U. S. 508, l. c. 510, controls, viz.:

> "This Constitution is the supreme law of the land, and no Act of Congress is of any validity which does not rest on authority conferred by that instrument."

The last sentence of Paragraph 2 of Section 2, Article III of the Constitution vests the appellate jurisdiction of this Court, as to this case, in this Court. That appellate jurisdiction must be exercised, if the power of Congress applies,

> "* * * with such Exceptions, and under such Regulations as the Congress shall make."

Sections 1254, 2101 and 2106, Title 28, U. S. C., constitute the existing regulations under which this Court must

exercise said appellate jurisdiction. They do not constitute exceptions enacted by Congress to said appellate jurisdiction, but, according to the contentions of respondents, vest a jurisdiction in this Court to exercise its discretion to decide whether or not it (this Court) will except this case from said appellate jurisdiction.

As to said feature, if said Acts contain such a provision, then such provision is in direct conflict with the provision of the Constitution declaring that the exceptions must be made only by the Congress, and therefore not by this Court.

So this is a case to which both the Constitution and the statute apply. And if they are in conflict, then it is the function of this Court to so decide, and thereupon give effect to the Constitution and treat the law as of no force and effect. This under the rule stated by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch. 137, l. c. 177-178, when he thus expounded the law:

> "If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of those conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

In *Williams* v. *United States,* 289 U. S. 553-581, this Court held an Act of Congress void because in conflict with the provisions of Article III of the Constitution

with reference to judicial power. One reason given was because, l. c. 580:

> "* it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands,* 277 U. S. 189, 201, 202, 72 L. ed. 845, 849, 48 S. Ct. 480." (Italics the Court's.)

In whom was the power to except vested by the following language of the Constitution:

> "* with such exceptions, and under such regulations as the Congress shall make"?

Said language of the Constitution answers the question, and hence destroys what has been referred to as the certiorari jurisdiction of this Court, in its discretion, to except any case it pleases—even when this Court has constitutionally conferred appellate jurisdiction—from such so granted appellate jurisdiction.

In *Springer* v. *United States,* 277 U. S. 189, this Court held that an Act of the legislature, appointing a committee thereof to enforce statutes it enacted, was void because the organic law vested that power in the Governor. Said the Court, l. c. 201-202:

> "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legisla-

tive power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule."

Congress cannot "bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." (*Den ex. dem. Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, 15 L. Ed. 372; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 475, 14 St. Ct. 1125, 38 L. Ed. 1047).

The words in the Constitution that the Supreme Court shall have appellate jurisdiction

> "* with such Exceptions, and under such Regulations as the Congress shall make"

expressly declare that the power thus vested in Congress is not a subject for judicial determination, and therefore could not be delegated to this Court by the acts of Congress authorizing the issuance of writs of certiorari.

This Court states that denial of certiorari is not a judicial determination for the simple reason that in denying the appellate jurisdiction of this Court, within the meaning of the Constitution, the Court does not function.

IX.

This Court, in hitherto obeying said Acts of Congress, has merely followed the command of the Constitution as invariably interpreted and construed by this Court—that it has no power to veto Acts of Congress and must obey void Acts of Congress until their validity is properly questioned.

This Court has no veto power on legislation enacted by Congress, and its right to declare an Act of Congress un-

constitutional can only be exercised when a proper case between opposing parties, raising such question, is submitted for determination.

That the petitioner has now properly raised this question is admitted by respondents in Commerce Trust Company's brief on pages 75-77, inclusive, adopted by the other respondents.

That this question has never been determined heretofore is admitted by respondents' statement of the fact that, notwithstanding they state

> "We have made much research on account of this startling contention,"

yet they have failed to produce a single authority showing that this Court ever decided the particular question here involved.

Respondents, without any foundation therefor, state in capital letters on page 76 of their brief:

> "* * * Petitioner is now contending that throughout the years your predecessors and yourselves have handled the applications for certiorari in a manner contrary to the provisions of the Constitution and without any right or jurisdiction so to do."

Whereas petitioner's contention is that this Court has merely enforced said Acts enacted by Congress, void as to their discretionary feature, never heretofore questioned, in accordance with the rule stated by the courts as follows:

In *Muskrat* v. *United States,* 219 U. S. 346, l. c. 357, 358, this Court pointed out that Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch. 137,

> "* * * was careful to point out that the right to declare an Act of Congress unconstitutional could

only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; * * *"

* * * * * * *

"The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury* v. *Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the Chief Justice in *Osborn* v. *Bank of the United States*, 9 Wheat. 819, 6 L. Ed. 223, speaking of the third article of the Constitution, conferring judicial power:

> 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.'

* * * * * * *

But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although

> they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a *case* in law or equity' arising under the Constitution, to which the judicial power does not extend."

The court there further said, l. c. 359:

> "'Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts."

Said Acts of Congress are void, not only because they place upon this Court, instead of Congress, the burden of making the exceptions to the appellate jurisdiction which the Constitution placed upon Congress, but said Acts are also void because no legislature can lawfully transfer to the judiciary the power to exercise a discretion to determine whether or not power embodied in a Constitution or statute shall be given operative effect in any action logically within its legitimate scope and intendment. Whether the law shall, or shall not, go into effect in particular cases can be determined only by Congress and not by this Court (*Sutherland* v. *Miller*, 79 W. Va. 796, 91 S. E. 993, L. R. A. 1917D, 1040; *Minn. St. P. & S. Ry. Co.* v. *Railroad Com'r*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. N. S. 821.

In *Massachusetts* v. *Mellon*, 262 U. S. 447, l. c. 488, this Court recently restated the same rule, thus:

> "We have no power *per se* to review and annul Acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."

The rule that this Court, and all others, are without constitutional authority to exercise a veto power over the Acts of Congress or the legislature is a universal principle, well illustrated by the opinion in *State ex rel. Field* v. *Smith*, 329 Mo. 1019.

The proceeding was by original mandamus to compel the appropriation of $1,442,425.00 as the cost of the police department of Kansas City. Said the opinion, l. c. 1024:

> "The return alleges the unconstitutionality of the statute."

The opinion then called attention to the fact that in neither of two preceding cases, l. c. 1026:

> "• • • was the constitutional question now presented either raised or considered. With reference to the particular statute here involved the question of the delegation of legislative power is one of first impression."

In holding the statute void the court said, l. c. 1026-1027:

> " 'One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it

must remain; and by the constitutional agency alone the laws may be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those in which alone the people have seen fit to confide the sovereign trust.' (1 Cooley on Cons. Limitations, 224.)"

"'The legislature may not delegate the power to *enact a law,* or to *declare what the law shall be,* or to exercise an unrestricted *discretion* in applying a law.'" (Italics ours.)

At l. c. 1032 the court said:

"In the Beach case the constitutionality of the statute was in no respect challenged. Only its construction was in question. The court held in effect that what is now said Section 7524 did prescribe *some limitations,* but that said Section 7535 encompassed its grant of power with boundaries that were all but intangible. When the case was under submission here, some of us were then of the opinion that the statute was unconstitutional in that it attempted to delegate the power to tax, but that question could not be raised by the court, *ex mero motu,* in a case of that nature."

The Beach case so referred to is 325 Mo. 175.

On page 77 of said Commerce Trust Company's brief respondents say of petitioner's contention as to the invalidity of said Acts of Congress:

"We doubt if petitioner's counsel realizes that this contention in effect says that your illustrious predecessors and the present members of your Court, all learned and able lawyers of outstanding national reputation, have throughout the years in the han-

> dling of writs of certiorari *violated the very provisions of the Federal Constitution.*" (Emphasis Commerce Trust Company's.)

At l. c. 177 of 325 Mo. (the Beach case report) it appears that the counsel above mentioned by respondents was there of counsel for the state. So that the physical facts show that said counsel was familiar with the law which has prevented this Court from heretofore holding that said Acts of Congress were void, and hence could not, and did not, make the contention attributed to petitioner in said quotation.

Petitioner's contention merely is that Congress enacted void laws, which it was the obligation of this Court to enforce until their validity was properly questioned, which respondents admit are now properly questioned by petitioner. See pages 2, 14 and 25 of said petition for certiorari.

It has ever been the rule of every civilization worthy of the name that its courts cannot be permitted to exercise their discretion as to whether they should, or should not, apply the applicable law. The only civilizations which recognized the contrary rule, for which respondents contend, were those which did not have proper tribunals, and which did not have a "legal professional class" to raise the questions, as shown by the following:

> "It has been stated before that the failure of Greek law was in its inability to discover a tribunal competent to expand, administer, and apply the private law among even its own citizens. This failure arose both from the popular nature of the tribunals and from the want of a legal professional class. It remained in the evolution of law for the Roman to develop this competent tribunal and a powerful profession. The result was that among the Romans there was a rule of law. Among them it was not possible to have a con-

dition where the tribunal openly avowed that it would apply to a controversy the unquestioned law applicable, *only when it seemed proper to apply it.*"

(The Story of Law, John M. Zane, pages 197-198.)

X.

The appellate jurisdiction of this Court is and always has been obligatory and never discretionary, and failure to take jurisdiction of this case would be treason to the Constitution.

In *Bank of the United States* v. *Deveaux et al.*, 5 Cranch. 61, Chief Justice Marshall said, l. c. 87:

> "The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The Constitution, therefore, and the law, are to be expounded without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

The same Chief Justice in *Cohens* v. *Virginia*, 6 Wheat. 265, said, l. c. 404:

> "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution.
>
> • • • • • • •
>
> "• • • we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

Under the authority of this Court (*Durousseau* v. *United States*, 6 Cranch. 307, and *Marbury* v. *Madison*, 1 Cranch. 137) the right even of a slave to the protection of the

Constitution of the government under which he lived was stated to be an absolute right, as shown in *Jim, a Slave,* v. *The State,* 3 Mo. 147, l. c. 149:

> "And whenever a case of appellate jurisdiction arises, and the authority of this court is invoked, the court is bound to exert it, it cannot decline the jurisdiction. It is the constitutional right of every subject of the laws of this State to claim its exercise. Such is the view taken by the Supreme Court of the United States, of the power of that tribunal under the Federal Constitution, which in this particular is similar to our own. *Durousseau* v. *The United States,* 2 Pet. Cond. R. 382; *Marbury* v. *Madison,* 1 Pet. Cond. R. 283; * * *"

The Constitution became effective March 4, 1789 (*Owens* v. *Speed,* 5 Wheat. 420). The provisions of said Constitution here invoked have been operating ever since, without any change or amendment.

So that the provisions of Article III of the Constitution and all of them, have the same force, meaning and effect now as they did at the time that the Constitution was adopted and went into effect.

This Court has thus stated the law in *South Carolina* v. *United States,* 199 U. S. 437-472, l. c. 488, 499, 450:

> "Two propositions in our constitutional jurisprudence are no longer debatable. One is that the national government is one of enumerated powers; and the other, that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.
>
> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its

grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those things were understood when made, are still within them; and those things not within them remain still excluded. * * *

'It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'

* * * * * * *

Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, 8 L. Ed. 23, 68, well declared:

> 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said.' "

The appellate jurisdiction vested in this Court by the last sentence of the second paragraph of Section 2 of Article III of the Constitution, at the time of its adoption and until March 3, 1891—for a period of 102 years—was obligatory and never discretionary; and Congress never

attempted, before March 3, 1891, to give this Court discretion to decline to review cases of which it had jurisdiction. This fact is established by the statement of Chief Justice Taft in 35 Yale Law Journal of November, 1925, page 1, when he said:

> "In the Act of 1891, Congress for *the first time conferred upon the Supreme Court,* in extensive classes of litigation, *discretion* to decline to review cases if they did not seem to the Court to be worthy of further review."
>
> * * * * * * *
>
> "At the centenary celebration of the launching of the Federal Constitution in Philadelphia"

the Congress was asked

> "* * * to relieve the court, which was then considerably more than three years behind."
>
> * * * * * * *
>
> "* * * the bill was not fully and satisfactorily formulated until the last session of the first Congress of the Harding administration."

The report of the Subcommittee of the Judiciary Committee of the United States Senate of April 7 and 8, which held hearings with reference to the Act of February 13, 1925, contains the following statement:

> "We proceed to indicate just what this bill does so far as the appellate jurisdiction of the Supreme Court is concerned. It removes all obligatory jurisdiction over the judgments and decrees to the Circuit Court of Appeals."

All the decisions of this Court from the beginning, and all other courts commenting on said decisions, recognized that the only variety of jurisdiction vested in this Court

by the Constitution was obligatory. This is established by the following authorities:

The same author (John M. Zane) who pointed out that it was not possible for the Romans

> "* * * to have a condition where the tribunal openly avowed that it would apply to a controversy the unquestioned law applicable, only when it seemed proper to apply it"

in the year 1928, and three years after the discretionary jurisdiction became fully operative, and recognizing the danger incident thereto, said:

> "It is possible, of course, for Congress to abolish all the jurisdiction of the inferior courts of the United States, but it could not affect the original jurisdiction *nor by the best opinion could it prevent the appellate jurisdiction of the Supreme Court from taking effect upon any case within the judicial power of the United States.* If this appellate jurisdiction could be abolished, the Supreme Court could be cut down to simply its original jurisdiction. This would in effect leave the Supreme Court without authority to pass upon any constitutional question arising under the Constitution of the United States.
> * * *
>
> Owing to the fact that the Court has not been entirely consistent in its rulings, it is impossible to say what the law is, but it does seem certain that Congress could not take away the appellate jurisdiction of the Supreme Court. Certainly the Convention never contemplated such a national suicide as being possible. That appellate jurisdiction is subject, of course, to such exceptions as Congress may by law have directed, but the Supreme Court will never make it possible for Congress to ruin the whole scheme of government." (Italics ours.) Pages 374, 375.

It is manifest that Mr. Zane, being the great philosopher and lawyer described in the introduction to "The Story of Law" by former Solicitor General Beck, was indulging in his gift of prophecy as to the decision of this Court in this case.

XI.

Notwithstanding this Court holds that denials of writs of certiorari do not decide the merits of any case, yet respondents claim that orders of this Court denying petitioner's applications for certiorari are *res judicata* of the issues herein.

In the Weede brief, page 30, under the heading "*Res Judicata*" said respondents say:

> "This is the fifth time that petitioner has carried the Moffett litigation complained of herein to the Supreme Court of the United States, and in each instance Your Honorable Court either denied or dismissed her petitions, to-wit:
>
> * * * Certiorari denied, 283 U. S. 826 * * *
> * * * Certiorari denied, 290 U. S. 602, 642
> * * * Certiorari denied, 298 U. S. 675
> * * * Appeal dismissed, 329 U. S. 669 * * *
> Rehearing denied, 329 U. S. 827 * * *

No mention is made in the quoted language, or on pages 30-31 of the Weede brief as to any decision being *res judicata* save and except those wherein this Court denied certiorari, and in one case where it dismissed an appeal on the ground that no Federal question was involved.

Thereafter Point II of the Weede brief, page 36, discusses a case in which no respondent here was involved, and has written the legend

> Certiorari denied, 298 U. S. 675.

Commerce Trust Company, on page 44 of its brief, states in a caption:

> "For the purpose of avoiding duplication and repetition, we hereby adopt that part of the brief of respondents Weede appearing in Point I of their Argument, under the caption entitled: *'Res Judicata.'* We also adopt their Point II."

Thus asserting that the orders of this Court denying certiorari are *res judicata.*

Commerce Trust Company has inserted a "Foreword" between pages 21 and 25. In its No. "2" on page 22 is the language:

> "Petition for Certiorari was docketed in this Court as case 'No. 181, October Term, 1933.' Cert. denied October 9, 1933 (290 U. S. 642). December 11, 1933, motion for leave to file petition for rehearing denied (290 U. S. 602). * * * "

In No. "3" on page 22 is the legend:

> "Certiorari docketed as case 'No. 918, October Term 1935.' Cert. denied May 18, 1936 (298 U. S. 675)."

In No. "5" on page 23:

> " * * * Appeal was docketed as case 'No. 318, October Term, 1945.' * * * October 14, 1946, this court granted motion of respondents to dismiss appeal and rendered its *per curiam* opinion reported in 329 U. S. 669. Same is also set forth in Exhibit 'I' to petitioner's complaint."

In No. "17" on pages 24-25:

> "This court denied certiorari on March 9, 1931 (283 U. S. 825; * * *)"

The brief for respondents Howard and Kopp, on page 11, states:

"• • • in the Supreme Court of the United States, a petition for certiorari, which petition was denied (290 U. S. 642)."

And on page 13 is the recital:

"Plaintiffs therein then filed a petition for certiorari in the Supreme Court of the United States which was denied, 298 U. S. 675."

On page 16 is the statement:

"Petitioners appealed to this court and the court dismissed the appeal because there were no Federal questions involved (329 U. S. 669)."

And then concludes on page 19:

"Right or wrong, the judgments and decisions assailed are final and binding on petitioner. This is conclusively shown by the authorities presented in the briefs of respondents Helen Weede and Orlin A. Weede and of respondent Commerce Trust Company in the instant case."

Thus adopting the *res judicata* contentions of the other respondents.

The orders heretofore denying certiorari to this petitioner were merely advisory opinions, advising the parties and all other courts and law book text writers, and all the world, that in its opinion petitioner was not entitled to any relief in this Court on her petition for certiorari.

Respondents, on pages 12 and 77 of Commerce Trust Company's brief, cite *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912-936, wherein, at l. c. 919, it is said:

"Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever

> regarding the Court's views on the merits of a case which it has declined to review. • • •''

In view of the fact that respondents rely on said authority in two parts of their briefs, and other parts represent to this Court that denials of certiorari as to this petitioner are *res judicata,* these respondents in effect state that this Court has itself, by its orders denying certiorari, denied to the petitioner the equal protection of the laws.

XII.

The 1948 revision of Title 28, U. S. C., has restored the obligatory constitutional appellate jurisdiction of this Court, both as to law and fact, in this case.

The dropping of the six words

> ''• • • or for any error in fact''

from Section 2105, Title 28, U. S. C., which had theretofore been in Section 1011, R. S. U. S., and in the Judiciary Act for 159 years (1789 to 1948), has operated to make the appellate jurisdiction vested in this Court by the Constitution operate upon all the issues of fact and law contained in the record. For the words of the Constitution are

> ''• • • shall have appellate jurisdiction, both as to law and fact.''

The dissenting opinion of Judge Holmes in *Sunray Oil Corporation* v. *Allbritton,* 188 F. 2d 751, discusses said question, l. c. 755:

> ''The statutory provision against reversals in jury cases for any error in fact remained on the books for 159 years; and, during that period the federal courts

lost the use of an ancient common law appellate power. This power, in our opinion, may be compared to an arm that has become atrophied; even legislation like Sec. 2106 cannot fully restore it; *only a decision of the Supreme Court can cure it completely.*" (Italics ours.)

In *Wiscart* v. *Dauchy,* 3 Dallas 321, l. c. 326-327, Justice Wilson well stated the law in his dissenting opinion, which is now applicable in full measure by reason of the repeal, after 159 years, of the Act of Congress then in force preventing reversal for any error of fact.

By the repeal of said six words, there is no Act of Congress now in force excepting this Court's appellate jurisdiction as to the facts in this case, but only the constitutional provision vesting appellate jurisdiction in this Court, both as to law and fact. And so the dissenting opinion of Mr. Justice Wilson as to the duty of this Court in a case where there was no Act of Congress excepting either law or fact from the appellate jurisdiction of this Court, necessarily states the law applicable to this case as follows:

"It is true, the act of Congress makes no provision on the subject; but, it is equally true, that the constitution (which we must suppose to be always in the view of the legislature) had previously declared that in certain enumerated cases * * * 'the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

"The appellate jurisdiction, therefore, flowed, as a consequence, from this source; nor had the legislature any occasion to do, what the constitution had already done. * * *

"This construction, upon the whole, presents itself to my mind, not only as the natural result of a candid and connected consideration of the constitution and

> the act of Congress, but as a position in our system of jurisprudence, essential to the security and the dignity of the United States."

The law as declared in said dissenting opinion of Justice Wilson became the law of the Court as declared in *Durousseau* v. *United States,* 6 Cranch. 307, l. c. 313-314, by Chief Justice Marshall, and followed by him in other cases.

The elimination of the phrase "or for any error in fact," by repeal, coupled with the regulations of the appellate jurisdiction of this Court as to this case, in Sections 1254, 2105 and 2106, Title 28, U. S. C., has restored the original appellate jurisdiction conferred on this Court by the Constitution. So that, since this case is lawfully brought before it, then—as to this case—its appellate jurisdiction is obligatory, both as to law and fact, and it has no discretion to decline its exercise.

The evil resulting from the effect of an order denying certiorari is well ilustrated in this case. For never, since this Court denied certiorari to petitioner as to said Harper County, Kansas, litigation (290 U. S. 542)—with one notable exception, *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751—has petitioner been able to obtain any relief in any court, State or Federal.

The Kansas Federal courts gave *res judicata* effect to the denial of certiorari by this Court as shown by the recitals in their opinions.

Respondents' brief in the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, called attention to such denials, l. c. 1112, and Judge Clark of that court in that case refused to grant any relief to petitioner, asserting that she had had not only her "day in court," but her "months and years" (p. 1130)—which, of course, was the very subject matter of her complaint—

that respondents had unlawfully kept her in court through all those days and months and years—and is still unlawfully continuing to do so.

The District Court and Court of Appeals in this case both call attention to the denials of certiorari by this Court, and gave effect thereto either as *res judicata,* or *stare decisis,* in accordance with the contentions of respondents. We now find respondents in this Court making the same contentions—though they have never filed an answer in any case and yet undertake to have this Court find the incorrect facts stated in opinions and affidavits which they have offered in evidence to be true—contradicted as they are by petitioner's exhibits—and on which the District Court failed to grant a summary judgment as they requested.

And, in violation of the rule well stated in *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185, they now seek to have this Court again deny petitioner any relief and urge consideration of the facts embodied in the matter outside the pleadings, filed by them under Rule 12 (b) (6), which were never ruled on by the District Court, and from whose order failing to rule on the facts they have prosecuted no appeal!

While this Court, times without number, has stated that it decides nothing when it denies an application for certiorari, yet the physical facts remain that in such case, as a practical matter, it has given an advisory opinion to the effect that, on the facts stated by a petitioner, the petitioner is not entitled, under the law, to relief, and practically affirms the decision of the lower court—even where it has jurisdiction to review it—no matter how erroneous.

Said void Acts of Congress have been construed by this Court—not by applying the ordinary rule to the effect that its decision on the petition for certiorari is con-

trolled by the majority of the Court, but by a minority consisting of four members and sometimes three—contrary to the rule well stated in Cooley's Constitutional Limitations, 7th Ed., pp. 138-139, as follows:

> "And as a court must act as an organized body of judges, and, where differences of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of a minority of a court, vested with power by the Constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members."

In *Hertz* v. *Woodman*, 218 U. S. 213-214, this Court applied the same principle above stated by Cooley on Constitutional Limitations, thus:

> "Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts."

The fact that when this Court is equally divided it has no power to render any decision, but that the decision of the lower court brought before this Court cannot be reversed, results from the failure of a majority of this Court to so decide. So that, this Court has thus applied the law as it has been stated in Cooley on Constitutional Limitations as above quoted.

It is apparent that the Acts of Congress, now questioned for the first time, have occasioned the rulings of this

Court in conflict with the above rule stated by Cooley in his Constitutional Limitations, and that said acts of Congress have resulted in this Court's decisions as to the grant or denial of petitions for certiorari, which decisions have established the law of this Nation to the effect that this Court, as to said grant or denial, is not governed or controlled by any law, but only by the votes of a minority of the judges who are members of this Court—thus and thereby changing the government from a government of laws to a government of men—and not only to a government of men, but to a government of men who are in the minority!

XIII.

The Acts of Congress authorizing this Court to exercise its discretion as to its appellate jurisdiction has converted this government from a government of laws and not of men to a government of men and not of laws.

In *Marbury* v. *Madison*, 1 Cranch. 137, Chief Justice Marshall said, l. c. 163:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.
>
> If this obliquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case."

Said language was used in February, 1803. Its basis is the Massachusetts Bill of Rights, adopted in 1780, of which John Adams, a signer of the Declaration of Independence, was the chief architect, which provided:

> "XXX. In the government of this commonwealth, the legislative department shall never exercise the

executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

In *United States* v. *Dickson et al.*, 15 Pet. 141, at l. c. 162, Justice Story said:

> "But it is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."

Rule 38 5 of this Court declaring that "A review on writ of certiorari is not a matter of right," interprets the Act of Congress first adopted in 1891 and made complete by the Act of February 13, 1925, and so said Acts of Congress changed the government of the United States from a government of laws into a government of men.

The Acts of Congress, and the Rule of this Court making such change, are therefore invalid.

The statement that "A review on writ of certiorari is not a matter of right" is in direct conflict with the law declared by this Court in *Marbury* v. *Madison, supra,* as to the right of a litigant in this Court. It is there said, l. c. 163:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

The Act of February 13, 1925, had been in operation for some 12 years when in response to popular uproar the President of the United States sought to relieve the Nation from the effects of the discretionary feature of said void Acts of Congress by a proposed bill contained in Senate Report 711, United States 75th Congress, first session.

On March 9, 1937, instead of blaming said Acts of Congress—and mistakenly blaming this Court—the President of the United States delivered an address in which he said:

> "We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men." Commager's Documents, 564, 565.

It was apparent that the bill proposed too much in view of the adverse report from the Committee on the Judiciary, wherein that senate committee subscribed to the doctrine that this is a government of laws and not of men by its condemnation of the bill in the following language:

> "Its ultimate operation would be to make this Government one of men rather than one of law, * * *" Commager's Documents, 571.

XIV.

The issue as to the invalidity of the Acts of Congress of March 3, 1891, February 13, 1925, and Section 1254, Title 28, U. S. C., and Rule 38 of this Court was duly raised in the petition for certiorari and supporting brief.

The petition for certiorari, page 2, invokes the jurisdiction of this Court under Section 2 of Article III, United States Constitution, and Sections 1254 (1), 2101 (c) and 2106, Title 28, U. S. C.

Question III (Pet., pp. 14-15) is:

"III"

> "This Court cannot lawfully refuse appellate jurisdiction vested in it by the Constitution and laws of the United States to enable it to perform its indispensable duty to take jurisdiction as to this case by granting the writ prayed for."

Point X (Pet., p. 25) also raises the question—not only as to the power of Congress to delegate the legislative power to this Court, but alleges and asserts that the Congress

> "• • • did not have power to delegate its legislative power to this Court, nor could Congress authorize this Court to exercise its discretion as to whether or not"

it will except this case from the appellate jurisdiction of this Court.

In *Balzac* v. *Porto Rico,* 258 U. S. 298, l. c. 304, the statutes questioned were nowhere mentioned in the record nor assignments of error. Said the Court, l. c. 304:

> "Those assignments did not mention the statutes whose validity was questioned, but merely averred

that the defendant had been denied his right as an American citizen under the 6th Amendment to the Constitution. While this is informal, we think that it is sufficient when the record discloses the real nature of the controversy, and the specification of the assignment leaves no doubt that it is directed to that controversy."

Rule 38, Par. 5 of this Court, based on said void Acts of Congress, in effect enacts a rule of substantive law, and is not a mere rule of procedure, and is therefore void.

In *Carter* v. *St. A. B. R. Co.*, 338 U. S. 430, l. c. 438, it is said that said rule governs

> "* * * this Court's discretion in granting a writ of certiorari."

Justices Sutherland and McReynolds, in the hearing before the Subcommittee of the Senate on the Judiciary, Vol. 236, page 56, in February, 1924, testified as follows:

> "The Chairman. There has been some discussion in the Judiciary Committee, with regard to the definition of the words 'practice and procedure.' What those words really embraced. Can you give us any suggestions with regard to the proper construction of the words 'practice and procedure'?
>
> "Mr. Justice Sutherland. Well, I don't know that I can give any precise definition. They apply, of course, wholly to the adjective law. They could not involve the making of any substantive law, because the Congress would be powerless to delegate such power to the courts. I should say it would be confined to making rules pointing out the way in which cases should be presented, and the way in which the court should discharge its duty in determining what the substantive law is. I don't know that I could state it any more accurately than that.

"Mr. Justice McReynolds. A method of determining and enforcing rights and liabilities which have been prescribed by law.

"Mr. Justice Sutherland. Yes; it would enable the courts to determine the 'how' but not the 'what' of the law."

In *Hudson* v. *Parker,* 156 U. S. 277, this Court said, l. c. 284:

"This court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States, or of a justice or judge of either, under the Constitution and laws of the United States. *Poultney* v. *La Fayette,* 37 U. S. 12 Pet. 472 (9: 1161); *Myer* v. *Tupper,* 66 U. S. 1 Black, 522, 526 (17: 180, 182); *The Lottawanna,* 88 U. S. 21 Wall. 558, 576, 579 (22: 654, 662, 663). Nor has it assumed to do so."

XV.

If the acts of Congress above questioned lawfully vest discretionary power in this Court to deny jurisdiction in all the cases mentioned in Section 2 of Article III of the Constitution be valid, then Congress is empowered by the Constitution to destroy the Government.

In Zane's The Story of Law, pages 374-375, it is said:

"It is possible, of course, for Congress to abolish all the jurisdiction of the inferior courts of the United States, but it could not affect the original jurisdiction *nor by the best of opinion could it prevent the appellate jurisdiction of the Supreme Court from taking effect upon any case within the judicial power of the United States.* If this appellate jurisdiction could be abolished, the Supreme Court could be cut down to simply its original jurisdiction. This would in effect leave the Supreme Court *without authority to pass*

upon any constitutional question arising under the Constitution of the United States. It would be possible for Congress to attempt to leave all cases whatsoever to the decision of state courts, except those cases where a state is a party or where foreign representatives are involved; but the Supreme Court has decided that certain jurisdictions of the United States courts are exclusive of the state courts. Owing to the fact that the Court has not been entirely consistent in its rulings, it is impossible to say what the law is, but it does seem certain that Congress could not take away the appellate jurisdiction of the Supreme Court. *Certainly the Convention never contemplated such a national suicide as being possible.* That appellate jurisdiction is subject, of course, to such exceptions as Congress may by law have directed, but the Supreme Court will never make it possible for Congress to ruin the whole system of government."

Mr. Zane there points out that the "better opinion" is that this Court has jurisdiction of the first class of cases mentioned in Section 2 of Article III, and that it cannot be taken away by Congress. The "better opinion" to which he referred is reflected in the opinion of Mr. Justice Story in *Martin* v. *Hunter,* 1 Wheat. 304, At l. c. 305-306, it is said:

> "This was a writ of error to the Court of Appeals of the State of Virginia, founded upon the refusal of the court to obey the mandate of this court, requiring the judgment rendered in this same cause, at February Term, 1913, to be carried into due execution. The following is the judgment of the Court of Appeals, rendered on the mandate: 'The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States *' "

The question presented by the record necessitated a complete re-study by this Court of the Constitution providing for its judicial power and appellate jurisdiction. So that, in its true sense, nothing said on that subject in *Martin* v. *Hunter's Lessee* is *obiter.*

The opinion there distinguishes between the first and second classes of cases extending the judicial power of the United States by Section 2 of Article III of the Constitution.

The distinction made results from the use of the word "all" as to the cases mentioned in the first class, and the dropping or excluding it as to the cases mentioned in the second class, specifically pointing out that the word "all" was inserted for a purpose as to the first class and *ex industria* omitted as to the second class. Thus showing that it was the intention of the Constitution to extend the judicial power of this Court to all those cases mentioned in the first class absolutely. And, by the omission of the word "all" from the second class, to confer power upon the Congress to except cases in the second class from the appellate jurisdiction of this Court. The opinion on this question is, l. c. 333-334-335-336:

> "In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is 'and that the judicial power shall extend to all cases'; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped seemingly *ex industria.* Here

the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, etc. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the *first class*, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to *all cases; and in the latter case to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.*

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. *It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety.* The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply

interested; it embraces also maritime torts, contracts, and offenses, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit (*sic*) the national sovereignty. The original or *appellate jurisdiction ought not,* therefore, *to be restrained,* but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend in all cases whatsoever.

A *different policy* might well be adopted in reference to the *second class of cases,* for although it might be fit that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognizance or original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrongs; and as to the other cases of the *second class,* they might well be left to be exercised under the *exceptions* and *regulations* which *Congress* might, in their wisdom, choose to apply. It is also worthy of remark that Congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject-matter; in the second, it is made materially to depend upon the value in controversy."

Said opinion thus calls attention to the fact that the Congress, in the Judiciary Act of 1789, construed the constitutional provisions referred to in the above quotation just as Justice Story did.

So that this Court is aided, as to the question here raised, by the great and weighty principle of contemporaneous construction of said provisions of the Con-

stitution by many members of the Convention who were then in the First Congress.

Not only is this Court aided by such contemporaneous construction, but it is also aided by the consideration that Chief Justice Marshall concurred in every word of Justice Story's opinion.

In Volume IV of Beveridge's Life of John Marshall, pages 144-145, it is stated that

> "'* an opinion was delivered by Story that aroused more contention and had greater effect on the American Nation than had all the decisions of the Supreme Court on international law up to that time. This was the opinion in the famous case of *Martin* v. *Hunter's Lessee*.
>
> It was Story's first exposition of Constitutional law and it closely resembles Marshall's best interpretations of the Constitution. So conspicuous is this fact that the bench and bar generally have adopted the view that the Chief Justice was, in effect, the spiritual author of this commanding judicial utterance. But Story had now been by Marshall's side on the Supreme Bench for four years and, in his ardent way, had become more strenuously Nationalist, at least in expression, than Marshall."

The footnote to the above statement reads:

> "Story wrote George Ticknor that Marshall 'concurred in every word of it.' (Story to Ticknor, Jan. 22, 1831, II, 49.)"

The Chief Justice in *Cohens* v. *Virginia*, 6 Wheat. 265, referred to the two classes of cases in Section 2 of Article II of the Constitution, which were the basis of Justice Story's opinion as above quoted in the following language, l. c. 378-379:

> "The second section of the third article of the constitution defines the extent of the judicial power of

> the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the court to all the cases described, *without making in its terms any exception whatever,* and without any regard to the condition of the party. If there be any *exception, it is to be implied against the express words of the article.*
>
> In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' 'and between a state and foreign states, citizens or subjects.' ''

He also treats "cases" and "controversies" as having the same meaning.

At l. c. 405:

> "If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any *controversy* depending in a court, the cause should depend on the validity of such a law, that would be a *case* arising under the constitution, to which the judicial power of the United States would extend."

In discussing the cases in the first case he says, l. c. 378:

> "This clause extends the jurisdiction of the court to all the cases described, without making in its terms any *exception* whatever, and without any regard to the condition of the party. If there be any *exception*

> it is *to be implied against* the *express words* of the article."

To hold with respondents' contentions would necessitate the overruling of *Cohens* v. *Virginia* on this point because the phrase

> "In all the other cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make,"

read in connection with the above statement by the Chief Justice, demonstrates that the exceptions Congress is authorized to make, cannot be made as to any case in the first class because Congress would have to imply its authority to make it "against the express words of the article."

The terms of the clause extending the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, could not be said of the second class of cases under the name "controversies" referred to in Section 2 of Article III.

It follows that said construction by the Chief Justice of the first class of cases named in Section 2 excludes the power of Congress to except any case of said first class from the appellate jurisdiction imperatively vested in this Court by the Constitution.

The Chief Justice concludes his discussion of this question in *Cohen* v. *Virginia,* 6 Wheat. 304, by the following significant language at l. c. 423:

> "The question, then, must depend on the words themselves; and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was *fully discussed* and *exhausted* in the case of *Martin* v. *Hunter.*"

The words in Judge Story's opinion, l. c. 336:

> "* as to the other cases of the *second class*, they might well be left to be exercised under the *exceptions* and *regulations* which Congress might, in their wisdom, choose to apply,"

are physical facts showing a construction by Chief Justice Marshall, Justice Story and this entire Court in *Martin* v. *Hunter, of the words*

> "* with such exceptions, and under such regulations as the Congress shall make,"

applying same only to class 2 of cases described in Section 2 of Article III of the Constitution.

In *The Moses Taylor* v. *Hammons*, 4 Wall. 411-431, the court, l. c. 428, quoted Section 2 of Article III, and in support of its conclusion said, l. c. 428-429:

> "In the opinion delivered in the case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 334, Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction; and that, with reference to this class, the expression is that the judicial power shall extend to all cases; but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form, to all

cases, and, with respect to the latter class to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons and various considerations of public policy are stated in support of this suggestion. The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts, a consideration which does not apply, at least with equal force, to cases of the second class."

In *Stevenson* v. *Fain*, 195 U. S. 165, it is said, l. c. 167:

> "The use of the word 'controversies' as in contradistinction to the word 'cases,' and the omission of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."

In *United States* v. *Hudson*, 7 Cranch. 32, it is said, l. c. 33:

> "Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it."

In Clause 2 of Section 2 of Article III of the Constitution it is provided:

> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate

> Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

According to the construction contended for by respondents, said original jurisdiction conferred by said quoted first sentence is the only jurisdiction vested in this Court by the Constitution. That is to say, this Court, if said contention be correct, has no constitutional jurisdiction save and except in cases affecting ambassadors, other public ministers and consuls and those in which a State is a party.

Chief Justice Hughes, in his letter of March 22, 1937, to Senator Wheeler, said:

> "Our original jurisdiction is defined by the Constitution and embraces cases to which states are parties. There are not many of these. At the present time they number thirteen and are in various stages of progress to submission for determination."

If this Court has jurisdiction only of such cases, then the offices of all of these illustrious Justices would be sinecures, for which they would have no duty to perform from a constitutional standpoint.

And if Congress has the power to deprive this Court of appellate jurisdiction by excepting from said appellate jurisdiction all of the cases described in the first class in Section 2 of Article III, then it is patent that what the founding fathers did was not to create a government of three distinct departments equal in rank and power, but to create a government which put it in the power of one of the departments to destroy another by excepting all cases from its appellate jurisdiction.

There are many opinions, wherein the question was not fully considered, that Congress has such power. But the

statements of Mr. Zane in his Story of the Law, pages 374-375, show that in his opinion the *better opinion* was to the contrary, and that the Congress did not have such power, and that this Court would not permit it so to do.

In *Williams* v. *United States,* 289 U. S. 553-581, one of the questions involved was whether or not the judicial power extends to every case in which the United States is a party, as reflected in the opinion in *Minnesota* v. *Hitchcock,* 185 U. S. 384. In holding that an affirmative statement that it had was erroneous this Court said, l. c. 572:

> "This conception of the application of the judicial article of the Constitution, which at first glance seems plausible, will be found upon examination and consideration to be entirely fallacious.
>
> We first direct attention to the carefully chosen words of Section 2, Cl. 1, Art. 3. By that clause the judicial power is extended to *all* cases in law and equity arising under the Constitution, etc., to *all* cases affecting ambassadors, other public ministers and consuls; and to *all* cases of admiralty and maritime jurisdiction. Then the comprehensive word 'all' is dropped, and the enumeration continues in terms to apply to controversies (but not to 'all') to which the United States shall be a party; to controversies between two or more states, etc. The use of the word 'all' in some cases, and its omissions in others, cannot be regarded as accidental, under the rule stated in an early case, *Holmes* v. *Jennison,* 14 Pet. 540, 570, 571, 10 L. ed. 579, 594, 595, and ever since fully accepted, that, 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and

shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.' See also *Myers v. United States,* 272 U. S. 52, 151, 71 L. ed. 160, 180, 47 S. Ct. 21.

The significance of the use of the word 'all' in some instances and its omission in others is commented upon by Mr. Justice Story in *Martin* v. *Hunter,* 1 Wheat. 304, 333-336, 4 L. ed. 97, 104, 105, and it is there suggested that the word 'all,' which is used in the earlier part of Section 2 of the judicial article, was dropped in the latter *ex industria,* and that from this difference of phraseology, perhaps, a difference of constitutional intention may with propriety be inferred. See also 2 Story, Constitution, 4th ed. p. 458, sections 1674, *et seq.*"

"We are here immediately concerned only with that provision of Article 3 which extends the pudicial power to 'controversies to which the United States shall be a party.' Literally, this includes such controversies, whether the United States be party plaintiff or defendant; but in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought against the United States. And here the omission to qualify 'controversies' by the word 'all', as in some other instances, becomes peculiarly suggestive."

* * * * * * *

The judicial clause also extends the judicial power (again omitting the word 'all') to controversies 'between a State and citizens of another State.' "

It thus appears that this Court, as recently as May 29, 1933, held that the absence of the word "all" from the second class of cases to which the judicial power was

extended by Section 2 of Article III of the Constitution, was a factor which necessitated the decision of this Court holding that the word "all" in the first class, and its absence in the second, prevented the extension of the judicial power to the case of the second class then before the Court—thus giving full effect to the construction placed by Justice Story and Chief Justice Marshall, and the other Judges of this Court, in *Martin* v. *Hunter*, 1 Wheat. 304, l. c. 333-336, of Article III of the Constitution.

The Constitutional Convention never contemplated that the Supreme Court of the United States would be required by said Acts of Congress to except from its appellate jurisdiction those cases which Congress alone was authorized to except therefrom by the provision in Clause 2, Section 2, Article III of the Constitution, "with such exceptions and under such regulations as the Congress shall make."

Many of its Chief Justices have called attention to the disastrous results of said Acts of Congress.

Chief Justice Taft, in *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, on May 7, 1923 said, as to certiorari under the Act of 1891:

> "Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Chief Justice Hughes, on March 22, 1937, wrote to Senator Wheeler, as to certiorari under the Act of 1925:

> "The work of passing upon these applications for certiorari is laborious. *"

The said Chief Justice, after pointing out that more than 80 per cent were denied, stated:

> "The remainder, falling short, I believe, of 20 per cent show substantial grounds and are granted."

In 1949 Chief Justice Vinson said, as to certiorari under Section 1254, Title 28, U. S. C.:

> "During the past term of Court, only about 15 per cent of the petitions for certiorari were granted. •"

While this Court has ruled that its orders denying certiorari do not decide the merits of any case, yet said ruling, as a practical matter, only applies in this Court. For, as heretofore pointed out, the first denial of certiorari by this Court with reference to the Harper County, Kansas, litigation herein, has been treated by all the courts other than this as having either *res judicata* or *stare decisis* effect. This includes the lower courts which have passed on this case, as shown by their opinions (R. 769-784, Pro. 1-14).

In addition, the authors of textbooks, many of whom have been connected with the 1948 revision of the Judicial Code, call attention in their works to the fact that "certiorari was denied" in many cases to which they refer.

In this connection we invite attention to the recent work of Barron and Holtzoff entitled "Federal Practice and Procedure."

State and lower Federal Court opinions call attention to the fact that this Court denied certiorari whenever they are again asked to decide anything with reference to a case which has resulted in such denial. (See opinions on which respondents rely.) See Point XI hereof.

Thus disclosing that these orders denying certiorari are given *res judicata* or *stare decisis* effect by all the courts, excepting this, and by all legal text writers without exception, and giving such effect to orders of this Court

which this Court declares have no effect and thereby rendering the jurisprudence of this Nation unknown and uncertain—as recognized by this Court in *Darr* v. *Burford*, 339 U. S. 200, and in the cases mentioned in paragraph 2 of Point XII on page 56 of petitioner's supporting brief.

Of course, this result was occasioned by said void Acts of Congress, which this Court was required to observe and enforce, since this question, so far as known, was never heretofore raised by any litigant. And if it had been, of course the Court would have held said acts utterly void and of no effect.

As these certiorari statutes were operating when Mr. Zane made his contribution to the jurisprudence of the Nations, and Chief Justice Taft's statement in *Magnum* v. *Coty* had been theretofore delivered, evidently occasioned his statement that

> "Certainly the Convention never contemplated such a national suicide as being possible."

The function of this Court as outlined by Madison is well stated in Warren's The Supreme Court in United States History, pages 14-15, as follows:

> "And the Court's power to pass on the Constitutional validity of Federal legislation was established by decisions of the Court itself, as an inherent and necessary judicial function in ascertaining and interpreting what the finally binding law was. Yet as Madison said in 1832, a supremacy of the Constitution and laws of the Union 'without a supremacy in the exposition and execution of them would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it. I have never been able to see that, without such a view on the subject, the Constitution itself could be the supreme law of the land: or that the uniformity of the Federal

> authority throughout the parties to it could be preserved; or that, without this uniformity, anarchy and disunion could be prevented.' "

Chief Justice Vinson on September 7, 1949, corroborated said statement by the following:

> "The debates in the Constitutional Convention made clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgments.' "

When the Constitution was adopted there were no Courts of Appeal, or decisions of this Court, as to which a decision of a lower court might be held in conflict.

So that, the Convention did not contemplate that Rule 38, or said Acts of Congress, would govern this Court in the exercise of its appellate jurisdiction.

The Act of April 13, 1925, was not approved by everyone, as shown in the Columbia Law Review, Vol. 25, page 393, 407, for April 1925:

> "Any one who has read the testimony given before a sub-committee of the Senate Judiciary Committee when the bill, recently enacted into law, was under discussion, will pick up the text of the statute with an optimism which he will soon discover to be unwarranted. * * *
>
> It may be said of the new act that it put a premium on the 'scarlet word'. Cf. Alfred Noyes, Some Aspects of Modern Poetry, pp. 128, 130."

No necessity or exigency of this Court, or of this Government or any of its departments, justified any disobedience of the command of the Constitution. Only by amendment can such exigency or necessity be provided for. It is unlawful to provide therefor by a void Act of

Congress. The rule was well stated in *Ex parte Milligan*, 4 Wall., l. c. 120-121:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of the provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence. *"

It is therefore respectfully submitted that the relief prayed in petitioner's petition for certiorari be granted.

MARTIN J. O'DONNELL,
1353-1356 Dierks Building,
Kansas City 6, Missouri.
Victor 0760.

APPENDIX.

(Excerpts from complaint written in February, 1948, alleging conspiracy of a state fiduciary officer with two state judges and others, acting under color of law, resulting in deprivation to petitioner of the equal protection of the laws, due process and privileges and immunities—thus meeting the requirements ruled by this Court in June, 1951, as necessary for statement of a claim under Section 43, 47 (2) (3) on which relief can be granted, in *Collins* v. *Hardyman*, 341 U. S. 651-664, Preliminary Print, at l. c. 660).

Par. 1 (R. 3).

"This action is for damages caused by overt acts done and caused to be done pursuant to a conspiracy to which defendants were parties, and who *conspired* for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the States of Missouri, Kansas and Oklahoma, *with intent to deny* Thomas S. Moffett and plaintiff, as citizens of the United States, the *equal protection of the laws*, and pursuant to which said Thomas S. Moffett and plaintiff were purposefully discriminated against by said States through their agents and thereby *deprived of the equal protection of the laws* * * *"

Par. 2 (R. 4).

"* * * Said order was made for the purpose of enabling Commerce Trust Company as an agent of the State of Missouri to prosecute fictitious claims for its benefit as executor of the estate of John Moffett against itself as the administrator of said partnership estates, and to institute and maintain said fictitious claims hereinafter mentioned, and thereby through intentional and purposeful discrimination against Thomas S. Moffett and plaintiff to *deprive* them of their property *without due process of law*, and *deny* to them *the equal protection of the laws* and *of all the rights guaranteed* by said XIVth Amendment."

Par. 3 (R. 4).

"• • • in connection with said order of said 'Special' judge, *deprived* Thomas S. Moffett of his property without due process of law, *and denied him the equal protection of the laws and his privileges and immunities* as a citizen of the United States, • • •"

Par. 7 (R. 6).

"• • • and thus Thomas S. Moffett and plaintiff were *denied* the *equal protection of the laws and the rights, privileges and immunities* guaranteed to them by Section 2 of Article IV, and by Section 1 of the XIVth Amendment of the United States Constitution."

Par. 17 (R. 13).

"• • • Said defendants have kept said fictitious actions pending for the purpose of attempting to coerce plaintiff into paying sums for which plaintiff was not liable, and to oppress her by preventing the final settlement of said estates; and, pursuant to said conspiracy, caused said circuit court to keep said unlawful action pending; and by such acts plaintiff has been intentionally and purposefully discriminated against, and has been *denied the equal protection of the laws* of the United States, Missouri, Kansas and Oklahoma, and prevented from enjoyment and possession of the small portion of the property of said Thomas S. Moffett's estate devised and bequeathed to her which defendants have not yet misappropriated."

Par. 18 (R. 13-14).

"Said suit for $441,957.71, • • • and have carefully maintained said fictitious suits on the dockets of said courts until the filing of this action, • • • and said defendants thus using State power, have caused said State, intentionally and purposefully, to discriminate against plaintiff, contrary to the rule applied to litigants in general, and *thereby denied to plaintiff the equal protection of the laws,* in violation of the XIVth Amendment."

Par. 32 (R. 18).

"About December 6, 1929 * * * Thomas S. Moffett was *deprived* of his farm of 1,127½ acres, and thereby *deprived* of having and exercising his right and privilege as a citizen of the United States of owning and possessing said property, Thomas S. Moffett appealed to the supreme court of Kansas seeking redress from said judgment. Notwithstanding the facts appeared in the record before the district judge and before said supreme court, said supreme court of Kansas affirmed said judgment. Said Kansas courts thereby intentionally and purposefully *denied T. S. Moffett the equal protection of the laws,* contrary to the XIVth Amendment to the Constitution of the United States. * * *"

Par. 37 (R. 20).

"Thomas S. Moffett died on December 22, 1930. The judge of said district court, without application by any party in interest but on application of Helen Weede, on February 14, 1931, made an order purporting to revive said abated partition suit, naming the ancillary administratrix of the estate of Thomas S. Moffett in Kansas as a party plaintiff, and this notwithstanding a suit of partition real estate could not, under the law of Kansas, be either brought, revived or prosecuted by the administratrix of T. S. Moffett's estate, or in the administratrix's name as plaintiff—thus and thereby, intentionally and purposefully, discriminating against plaintiff in favor of defendants, and *denying the equal protection of the laws to plaintiff* as the sole devisee of said Thomas S. Moffett, and the owner of 7/12ths interest in said lands, and the administratrix of the Moffett Brothers and T. S. Moffett estates in Kansas. * * * And, though without jurisdiction or authority so to do, said district judge intentionally and purposefully discriminating against plaintiff, made said entry of revivor against the said plaintiff in the said partition suit, thus *denying to her her privileges and immunities as a citizen of the United States,* and as a citizen of Missouri enjoyed by the residents and citizens of Kansas, and *thus denied her the equal protection of the laws.*"

Par. 38 (R. 20-21).

"Said district judge thereafter rendered a judgment for $143,829.96 against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate, * * * thus giving effect to the unlawful acts of the defendants aforesaid in said court, and *denying* to Moffett Brothers partnership estate, and to plaintiff, the *equal protection of the laws,* and *due process of law,* and to plaintiff *her privileges and immunities as a citizen of the United States,* and the protection of the Constitution and laws of the United States. That said judge of said court, though without jurisdiction, power or authority so to do, and notwithstanding the administrators as surviving partners of the partnership estate of Moffett Brothers Cattle, Land and Lumber Company were not in the district court of Harper County, Kansas, in their official capacity, and were without possession of any property belonging to said partnership estate in Kansas, rendered a judgment against said administrators and survivors of said partnership estate for the sum of $101,228.06. And by said acts said district judge, intentionally and purposefully, *denied* to said plaintiff *the equal protection* of Section 1 of Article IV of the Constitution of the United States, and the act of Congress adopted to give effect to said constitutional provision * * * And this notwithstanding Section 60-310, Revised Statutes of Kansas 1923, provided that claims barred by the statutes of states in which nonresidents resided should also be barred in Kansas, *the equal protection of which statute was* also intentionally and purposefully *denied* by said Kansas district court, contrary to said XIVth Amendment, * * *"

Par. 42 (R. 23-24).

"* * * Said books constituted no basis for said Commerce Trust Company's Exhibit No. 8. So that, the State of Missouri and the State of Kansas, through their Moffett representatives and said judge, jointly, by the use of said false document and by their intentional, purposeful discrimination *deprived* plaintiff of her property *without*

due process of law, and *denied to her the equal protection of the laws,* in violation of the provisions of Section 1 of the XIVth Amendment to the United States Constitution."

Par. 47 (R. 26).

"Though the laws of Kansas and Missouri prohibited said Commerce Trust Company and said Howard from appearing in the Kansas courts in said conflicting capacities, yet said judges, intentionally and purposefully, authorized such appearance in said conflicting capacities, and thereby intentionally and purposefully discriminated in favor of Commerce Trust Company as executor *de bonis non* of the John Moffett estate, and *denied* to said Commerce Trust Company as alleged Missouri administrator of Moffett Brothers partnership estate—and by the same acts *denied* to plaintiff—the *equal protection of the laws* and the *other rights guaranteed* by Section 1 of the XIVth Amendment to the United States Constitution."

Par. 48 (R. 27).

"* * * Thereafter, under the compulsion of said order, defendants, by threats of litigation and receiverships, compelled said Thomas S. Moffett and plaintiff to execute a special warranty deed conveying said ranch to Commerce Trust Company individually, without consideration. Said 'Special' judge, in making said order under color of the statutes of Missouri, intentionally and purposefully discriminated against Thomas S. Moffett and in favor of said defendants, and *denied* to Thomas S. Moffett *the equal protection of the laws and the rights, privileges and immunities* guaranteed by the XIVth Amendment of the United States Constitution. * * * Said Commerce Trust Company, as an agent of the State of Missouri acting as executor of the John Moffett estate and administrator of said partnership, intentionally and purposefully *denied to plaintiff the equal protection of the laws* so guaranteed."

Par. 51 (R. 29).

"Said conspirators caused said Andrews, posing as administrator of Moffett Brothers and Andrews partnership estate in Kansas, when he was not, to appear in the probate court of Wyandotte County, Kansas, and to present a non-existing claim for $1,386.19 against the estate of Thomas S. Moffett. The judge of said court entered an order on June 16, 1941, directing that said sum be paid to said Andrews by said administratrix, who was compelled, as a condition precedent to an order discharging her as administratrix, to pay said sum to said Andrews. Thereby said sum was misappropriated and lost to said estate and to plaintiff, in direct violation of the *rights and protection guaranteed to plaintiff* by Section 1 of the XIVth Amendment."

Par. 52 (R. 29-30).

"After the discharge of the ancillary administratrix of the estate of Thomas S. Moffett on June 16, 1941, and after the transfer by her of all rights then existing in favor of said estate to plaintiff, plaintiff on August 22, 1941, instituted an action in the circuit court of Jackson County, Missouri, against defendants for the same damages caused by the same conspiracy and the same overt acts pursuant thereto, seeking the same relief sought in this action. On Saturday, December 30, 1944, said state action was dismissed by said circuit court on the ground of misjoinder of parties plaintiff. On appeal to the supreme court of Missouri said judgment was affirmed. Section 922, R. S. Mo. 1939, was the statute * * * which said statute excluded misjoinder of parties plaintiff as a ground of demurrer. The Missouri courts, * * * construed into said statute a provision which was not in it, namely, misjoinder of parties plaintiff as a ground of demurrer, contrary to the provision of Article III of the Constitution of Missouri of 1875 and Article II of the Constitution of Missouri of 1945, prohibiting the courts from exercising legislative power, thereby *denying* to plaintiff *the equal protection of the laws,* contrary to the guaranty

of the XIVth Amendment to the United States Constitution. Said acts by the Missouri courts were * * * caused to be done under color of the laws of the State. Whereas said acts were a *denial by the State* of the *equal protection* of said IIId and IId articles of said Constitutions, and a violation of *plaintiff's rights* under the *equal protection provision of the XIVth Amendment.* Notwithstanding the repeal of said Section 922 became effective on Monday, January 1, 1945, the supreme court of Missouri, in affirming the judgment of the circuit court on February 11, 1946, applied said non-existing statute and parts thereof which had not been applied by the circuit court, in support of its judgment of affirmance, thereby *denying* to plaintiff said *equal protection of the laws.* * * *"

Par. 54 (R. 31-32).

"Defendants, by threats of enforcing said void judgment for $101,228.06 mentioned in paragraph 38 hereof, and other unlawful inducements, caused a void deed by said Oklahoma administrator to be delivered to Commerce Trust Company as alleged Missouri administrator purporting to convey said Oklahoma lands * * * All of which acts were known by said defendants to be void and to have been done by said district judge and said administrators, and executor of the estate of John Moffett, as State officials exercising the powers of the State of Kansas and Missouri and Oklahoma, as acts done pursuant to said corrupt conspiracy. And this notwithstanding said defendants knew that said acts were unlawful acts in direct violation of the laws of the States of Kansas, Oklahoma and Missouri, and thus and thereby *deprived* plaintiff of her interest in said Oklahoma property, in violation of all the guaranties of Section 1 of the XIVth Amendment to the United States Constitution. By said acts said States, through said district judge and said executor and administrators, wilfully, intentionally and purposefully discriminated against plaintiff. Said acts *denied to plaintiff the application and benefit of the laws applicable to all other persons in general under the laws of said States and the United States.*"

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FILE
JUN 30
CHARLES ELMORE

In the Supreme Court of the United States

No. 75, October Term, 1951.

No. 762, October Term, 1950.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

BRIEF OF RESPONDENTS HELEN WEEDE AND ORLIN A. WEEDE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ORLIN A. WEEDE,
WALTER A. RAYMOND,
R. CARTER TUCKER,
Counsel for Respondent Helen Weede.
ORLIN A. WEEDE, *Pro Se.*

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO

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Federal Rules of Civil Procedure.

Rule 9(b) 39

Statutes Cited.

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In the Supreme Court of the United States

No. 75, October Term, 1951.
No. 762, October Term, 1950.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

BRIEF OF RESPONDENTS HELEN WEEDE AND ORLIN A. WEEDE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

NOTE RE RECORDS AND SUPPLEMENTAL RECORDS: References to Supplemental Record of respondents Helen Weede and Orlin A. Weede (white cover) will be by placing letter "W" ahead of page numbers, as (W15). References to Supplemental Record of respondent Commerce Trust Company (blue cover) will be by placing letter "C" ahead of page numbers, as (C15). References to petitioner's Record (brown cover) will be by plain numbers, as (15), except as to the "Proceedings in U. S. Court of Appeals, Eighth Circuit" (brown cover) will be referred to by "Pro.," as (Pro. 15).

OPINIONS BELOW.

The opinions of the District Court (769-784) are reported at 75 F. Supp. 303 and 87 F. Supp. 438. The opinion of the Circuit Court of Appeals for the Eighth Circuit (Pro. 1-13) is reported at 187 F. 2d 242.

Jurisdiction: The courts below had authority to pass on and dismiss petitioner's Second Amended Complaint on the ground that it failed to state a cause of action or claim upon which relief could be granted. *Bell* v. *Hood,* 337 U. S. 678.

STATEMENT.

Petitioner is not asking for equitable relief herein (W1012). This is a damage suit at law wherein petitioner attempts to allege conspiracy, by generalities and conclusions, on the part of respondents and others (2, 3), seeking $2,500,000.00 damages ($1,000,000.00 actual and $1,500,000.00 punitive) (33) "under the Constitution and Laws of the United States, and particularly Sections 41, 42, 43, 47 and 48, Title 8 U. S. C. A." (2, 3).

Petitioner Louise McGrew Moffett did not appeal from the dismissal of her Amended Complaint herein, 75 Fed. Supp. 303 (1, 2, 769), but did appeal (786) from the dismissal of her Second Amended Complaint herein, 87 Fed. Supp. 438 (82, 775); opinion inaccurately quoted by appellant (W1003-5). The United States Court of Appeals, Eighth Circuit, affirmed—187 F. 2d 242 (Pro. 1-13).

This is the fifth time petitioner has carried Moffett litigation to the United States Supreme Court, as will hereinafter appear.

This is the second time petitioner and her same counsel have prosecuted litigation through the United States courts charging conspiracy as to same parties and alleged situations as here. See *Louise McGrew Moffett* v. *Robbins, etc.*, 14 F. Supp. 602, 81 F. 2d 431; certiorari denied, 298 U. S. 675. All these courts decided against her.

The former conspiracy-damage suit carried to the United States Supreme Court through the Missouri state courts by petitioner Louise McGrew Moffett was the same as her suit herein, petitioner asserts (29).

In petitioner's Jurisdictional Statement to the United States Supreme Court in her said state suit filed July 19, 1946, No. 318, petitioner made the same assertions and contentions, with others, as now, of which Your Honor-

able Court takes judicial notice, and which are set out at pages 862 to 905, inclusive, of Supplemental Record of respondents Helen Weede and Orlin A. Weede herein (this Supplemental Record has white covers).

The Foreword and Statement of Facts as filed by respondent Helen Weede in said suit is set forth herein in respondent Helen Weede's Exhibit 47 (W943). The Court is now referred to same as it will help clear up for the Court numerous situations which were again adjudicated in that suit (193 S. W. 2d 588, 592, 354 Mo. 1098 (year 1946); appeal dismissed, 329 U. S. 669; rehearing denied, 329 U. S. 827).

Petitioner attempts herein to have the United States courts hold as void the Missouri Statute of 1911 providing for probate judges in each county of Missouri (3, 4) and also to hold as void Sections 85, 86 and 87, R. S. Missouri, 1919 (4, 5, 8), and hold as void and "fictitious" numerous final judgments and decisions of courts of competent jurisdiction in Missouri, Kansas and Oklahoma, and petitioner is attempting herein to again relitigate same, which final judgments and decrees are set forth in Motion to Dismiss of respondent Orlin A. Weede (83-94) and also in Motion to Dismiss of respondent Helen Weede herein (94-99) with references to pertinent paragraphs where same appear on face of petitioner's Second Amended Complaint.

The final judgments, decrees, and orders of courts of competent jurisdiction, to which petitioner Louise McGrew Moffett and Thomas S. Moffett, her husband, or either of them, were parties since the death of John Moffett, August 23, 1927, and of which petitioner now complains, and which petitioner is attempting to again relitigate herein, are also set forth in respondent Helen Weede's Exhibit 50 herein (W990), none of which have been modified, changed, or set aside, as follows:

Moffett v. *Moffett* (Comanche County, Kans.), 131 K. 546; 292 P. 942; Cer. den. 283 U. S. 826. Amicable partition proceedings in conformity with last cited Supreme Court opinion-Orlin A. Weede Exhibits 4 (W279), 5 (296) and 6 (W302); Helen Weede Exhibits 4 and 5 (W501), referred to in Paragraphs 27, 28, 30, 31, 32 and 33 (12-18) of petitioner's Second Amended Complaint. Petitioner Louise McGrew Moffett's Deed Confirming Partition of April 21, 1931, to respondent Helen Weede, then Helen Moffett, is set out at Orlin A. Weede's Exhibit No. 6 (W302).

Moffett v. *Moffett* (Harper County, Kans.), 131 K. 582, 292 P. 947; cited in *Clark, etc., and Louise McGrew Moffett* v. *Helen Moffett et al.*, 136 K. 711, 18 P. 2d 555, which petitioner cites in her Exhibit "E," Second Amended Complaint (25).

Clark, etc., and Louise McGrew Moffett v. *Helen Moffett et al.* (defendants), *Commerce Trust Company, etc., and R. O. Robbins, etc.* (intervenors) (Harper County, Kans.), 136 K. 711, 18 P. 2d 555; Cer. den. 290 U. S. 602; 290 U. S. 642; cited in petitioner's said Exhibit "E"; also the judgment, findings and conclusions of the trial court (District Court of Harper County, Kansas, suit 7374) set out in Exhibit 1 of Orlin A. Weede (W89-153).

Ethel Mott Zombro v. *Thomas S. Moffett, Louise McGrew Moffett et al.*, 44 S. W. 2d 149 (Jackson County, Mo.), referred to in Paragraph 26 of petitioner's Second Amended Complaint (15). Demurrer of Helen Moffett (now Helen Weede) in said Zombro case to petition to construe John Moffett will, sustained on ground that respondent Helen Weede had elected to take under the law and not under said will and was therefore not a proper or necessary party to said suit. See Orlin A. Weede's

Exhibits 15 (W335), 16 (W337), 17 (340), 18 (W341), 19 (W343) and 20 (W345.) No appeal taken by any party, including Thomas S. Moffett and Louise McGrew Moffett, as to the order sustaining said demurrer of Helen Moffett (now Helen Weede). Petitioner has called attention to this Zombro case on face of Second Amended Complaint in Paragraph 26 where excerpt is quoted concerning "construing the will of John Moffett."

Louise McGrew Moffett v. *Commerce Trust Company et al.*, 193 S. W. 2d 588 (Mo., 1946), *appeal* dismissed 329 U. S. 669; Reh. den. 329 U. S. 827; referred to at Paragraph 53 of Second Amended Complaint (30).

Louise McGrew Moffett v. *Helen Moffett et al.*, No. 12178, Circuit Court of Clay County, Missouri (partition), as set out in Orlin A. Weede's Exhibits 21-a (W346), 21-b (W350), 21-c (W352), regarding Helen Weede's election and her one-half share of the John Moffett estate.

Order of Distribution and Partition in suit No. 7374 in the District Court of Harper County, Kansas (Sept. 11, 1936) (see Helen Weede's Exhibit No. 31 (W785));

Order of Confirmation of Distribution and Partition of Kansas Lands to Helen Moffett, widow of John Moffett, Deceased, and Relative Commissioners' Report (dated May 13, 1937), in the District Court of Harper County, Kansas, 7374, Helen Weede Exhibit No. 33 (W790);

Order of Confirmation of Distribution and Partition of Oklahoma Lands to Helen Moffett, widow of John Moffett, Deceased (dated July 15, 1937), in the District Court of Harper County, Kansas, suit No. 7374, Helen Weede Exhibit No. 34 (W810);

Order for Final Settlement, in the Matter of the Estate of John Moffett, deceased, No. 1015, in Probate Court of Chautauqua County, Kansas, Helen Weede Exhibit No. 39 (W851) (1940);

Order Approving Final Account and Decree of Final Settlement and Settlement and Distribution (July 29, 1940) in the Matter of the Estate of John Moffett, deceased, No. 7833 in the County Court of Oklahoma County, Oklahoma, Helen Weede Exhibit No. 40 (W859);

Order Approving Commissioners' Report (partition Oklahoma lands) (Nov. 9, 1938), in District Court of Harper County, Kansas, suit No. 7374, Helen Weede Exhibit No. 23 (W640);

Following orders, in District Court of Harper County, Kansas, dated December 8, 1938, in suit No. 7374, see Helen Weede Exhibit No. 23 (W638-644):

Order Overruling Objections to Further Proceeding;

Order Re Final Report (R. O. Robbins, Admr.);

Appeals by said Louise McGrew Moffett and Grace Torrance Clark from the last mentioned orders, Nos. 34224 and 34309 in Kansas Supreme Court were dismissed by the Kansas Supreme Court (W639).

Petitioner Louise McGrew Moffett in her two capacities *as here*, in her suit in the United States Courts, *Louise McGrew Moffett, etc.*, v. *R. O. Robbins, etc.*, 14 Fed. Supp. 602, 81 Fed. 2d 431 (10 Cir.; January, 1936) (W250), certiorari denied 298 U. S. 675, alleged conspiracy between the same parties as to same alleged situations as here, as shown by appellant's Transcript of Record (10 Cir.), respondent Orlin A. Weede Exhibit No. 1 herein (W36, 64, 69, 80), and petitioner therein attacked the final decrees of the District Court of Harper County, Kansas, suit 7374, and attacked the above Kansas Supreme Court decisions which sustained said Harper decrees (18 Pac. 2d 555, 136 K. 711, 290 U. S. 602, 290 U. S. 642; 292 Pac. 947, 131 K. 582). Petitioner is herein attempting to relitigate all those matters and to nullify the above United States Court decisions (2-72). Petitioner has made her Exhibit "E" a part of her Second Amended Complaint (25),

therefore the citations therein hereinbefore set out appear on the face of the Second Amended Complaint (39, 40), in addition to the allegations in said Second Amended Complaint proper (2-33).

Also appears on the face of petitioner's said Second Amended Complaint, suit No. 3348, *Helen Moffett* v. *T. S. Moffett et al.,* in the District Court of Comanche County, Kansas (12-18) and on appeal, *Moffett* v. *Moffett,* 292 Pac. 942, 131 K. 546, Cer. den. 283 U. S. 826 (84, 87) and *Zombro* v. *Moffett,* 44 S. W. 2d 149 (Mo.), cited with approval by the Kansas Supreme Court in aforementioned suit, *Clark, etc., and Louise McGrew Moffett* v. *Moffett et al.,* 18 Pac. 2d 555, 136 K. 711 (95). In Paragraphs 52 and 53, said Second Amended Complaint (29, 30, 31), petitioner sets out allegations concerning her damage suit in the Missouri courts and that same was against same parties as here, asking the same damages, relief, asserting same alleged conspiracy by generalities and conclusions as here (29), and sets out a few of the allegations in her Fifth Amended Petition therein (514-520), which said petition was dismissed after three demurrers sustained in Circuit Court (521), two on general demurrers and third on misjoinder parties plaintiff and on appeal the Missouri Supreme Court ruled that petitioner Louise McGrew Moffett has not only had her days in court but her months and years (193 S. W. 2d 588, 592; 354 Mo. 1098 (1946)); appeal dismissed, 329 U. S. 669; rehearing denied, 329 U. S. 827 (30, 85, 98). THIS LITIGATION WAS SUBSEQUENT (1946) TO THE HOWARD FEE CASE WHICH WAS DECIDED MARCH 6, 1940, cited repeatedly in petitioner's complaint, and petition herein.

In addition to all of the aforegoing final decrees and judgments which petitioner is attempting to collaterally attack herein and which she calls "void" in her petition herein, brief and Second Amended Complaint, petitioner

is also attacking pending litigation, so-called "fictitious" suits and claims, in various courts, referred to by partial captions, in her Second Amended Complaint (9-14) and wants Your Honorable Court to prejudge and assume that same are fictitious (9-14).

When petitioner Louise McGrew Moffett filed her Second Amended Complaint herein February 7, 1948 (2) she had on file in the Circuit Court of Jackson County, Missouri, her second amended petition in her suit No. 341,312, *Louise McGrew Moffett et al.* v. *Helen Moffett* (now respondent Helen Weede), *Commerce Trust Company et al.*, filed by her June 27, 1933 (C94-104), asking the Court to consolidate said so-called fictitious claims and suits therein, and to enjoin further proceedings elsewhere (C94-104). Without notice, petitioner caused dismissal of her said suit 341,312 July 13, 1948 (W861).

Petitioner, in her said second amended petition in said suit 341,312, stated (C98, 99):

> "That judgments in said cause in Harper County, Kansas, were entered, from which an appeal was taken to the Supreme Court of the State of Kansas, which latter court caused an entry to be made on its records affirming said judgments, to review which judgments of affirmance an application has been made in the Supreme Court of the United States for a writ of certiorari directed to the Supreme Court of Kansas, for which reason the matters involved in the suit in Harper County, Kansas, are not now before this Court in this cause for determination."

The Harper County, Kansas, judgments just referred to by petitioner in above quotation are the same as referred to in her petition and brief herein.

Thomas S. Moffett, husband of petitioner, started suit 7374 in the District Court of Harper County, Kansas, August 15, 1929 (W993) (making respondent Helen

Weede a party defendant) (W453) to partition the Moffett Brothers land and asked that the interests of all parties be determined. Notwithstanding this, he tried to partition Moffett Brothers lands before there was an accounting. Commerce Trust Company as administrator of Moffett Brothers partnership estate and also as executor of the estate of John Moffett, deceased, through its attorney, respondent B. C. Howard, asked leave to intervene in said Harper equity accounting suit and the Kansas Supreme Court held that an accounting was proper in said suit, and sustained the trial court in granting leave to Commerce Trust Company to intervene in its two capacities, before trial on the merits, and in its opinion (1930), *Moffett* v. *Moffett,* 292 Pac. 947, 131 K. 582, 588, said:

> "Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict. But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties."

Said court also held:

> "Appellant contends that the action is not brought in the proper forum for an accounting. But the plaintiff chose this forum and is in no position to complain on that ground. Appellant contends that a proper accounting, such as asked for by appellees, would require the consideration of property situated in other states—Missouri and Oklahoma. But it is a principle of law, applicable to courts of equity, that such a court, having assumed jurisdiction of the subject matter, will reach out and draw into its consideration and its determination the entire subject matter, and bring before it all the parties interested therein, in order that a complete and effectual final decree, adjusting the rights of all parties, may be

> entered and enforced. (*Hazen* v. *Webb,* 65 Kan. 38, 68 Pac. 1096; *Apple* v. *Smith,* 105 Kan. 732, 185 Pac. 903; the same case on rehearing, 106 Kan. 717, 190 Pac. 8)."

The Eighth Circuit case, *Coleman* v. *Apple,* 298 Fed. 718, certiorari denied, 266 U. S. 619, and *Smith* v. *Apple,* 6 Fed. 2d 559, are related cases and in point.

After the Kansas Supreme Court determined that an accounting was proper and also proper for the Commerce Trust Company to intervene as aforesaid, Thomas S. Moffett died December 22, 1930 (W95) and said suit was revived in the names of petitioner Louise McGrew Moffett and Grace Torrance Clark, executrix of the estate of Thomas S. Moffett in Kansas as plaintiffs (W96, 121, 122). They asked the Harper County District Court for leave to plead (W525). Before the trial of said Harper suit 7374, all interested parties, including petitioner Louise McGrew Moffett, entered into the following stipulation for an accounting (W215-216, W211, W518, 519):

> "We the undersigned, being all of the parties, plaintiff, defendant and intervenors in the above entitled cause, hereby stipulate and agree that said cause may be set down for a hearing on Wednesday, October 14th, 1931, before the court at 10:30 o'clock a. m. on said day and further stipulate that in the event an accounting should be ordered by the court herein the said parties hereto hereby agree that further proceedings in said cause shall go forward without delay, or at such time as the court may order."

The court, on October 14, 1931, ordered said accounting (W181, 176), and the accounting went forward in said Harper suit as shown by the findings, conclusions and decrees (W89-151; W181-205).

The 46 Specifications of Error (W984-990) filed by petitioner and her present counsel in 1932 in the Kansas Supreme Court on appeal from the final decrees rendered in said Harper suit 7374 (trial on merits) set forth the contentions of petitioner in that suit on appeal. No objection was made by petitioner in said Specifications of Error that the Commerce Trust Company was an intervenor in its two capacities, in said Harper equity accounting suit. The Kansas Supreme Court on trial on the merits in said Harper suit sustained the trial Court: *Clark, Louise McGrew Moffett* (petitioner) v. *Helen Moffett* (now respondent Helen Weede) *Commerce Trust Company* (respondent) *et al.*, 18 P. 2d 555, 136 K. 711; certiorari denied, 290 U. S. 640, 290 U. S. 642.

The subject matter of a number of petitioner's alleged "fictitious" suits and claims was included in the accounting in the Harper equity-accounting-partition suit No. 7374 and there were adjudicated many accounting claims between John Moffett and Moffett Brothers, between Thomas S. Moffett and Moffett Brothers, and between the Oklahoma partnership of Moffett Brothers Cattle, Land & Lumber Co. and Moffett Brothers, as shown by the decrees (W180-205) and Findings of Fact and Conclusions of Law (W89-151). Moffett Brothers was dissolved by the death of John Moffett August 23, 1927 (W89).

Said Harper final decrees (W180-205; W89-151) were affirmed by the Kansas Supreme Court, *Clark, etc., Louise McGrew Moffett* v. *Helen Moffett, et al.*, 18 Pac. 2d 555, 136 K. 711 (January, 1933), certiorari denied, 290 U. S. 602, 290 U. S. 642. In the accounting in said Harper suit No. 7374, the subject matter of the following petitioner's alleged and so-called "fictitious suits and claims" (9, 13) was adjudicated (W180-205) and there-

fore the following suits and claims have been dismissed, to-wit:

> Suit No. 320,648, Circuit Court, Jackson County, Missouri, *Moffett Brothers* v. *Oklahoma partnership of Moffett Brothers Cattle, Land & Lumber Co.*, $212,138.41 (9), dismissed as shown by Orlin A. Weede Exhibit 22 (W356); and suit for identical amount, $212,138.41, between same parties, filed in Circuit Court, Oklahoma County, Oklahoma (11), dismissed as shown by Orlin A. Weede Exhibit 27 (W393);
>
> Claim of estate of *John Moffett* v. *Moffett Brothers*, $140,714.79 (10), filed in the Probate Court of Jackson County, Missouri, dismissed as shown by Orlin A. Weede Exhibit 23 (W357); and claim for identical amount, $140,714.79, between same parties, filed in Probate Court of Chautauqua County, Kansas (11);
>
> Claim of *Moffett Brothers* v. *Thomas S. Moffett Estate*, $29,558.47, filed in Probate Court of Jackson County, Missouri (10), dismissed as shown by Orlin A. Weede Exhibit 24 (W359).

The final decree in said Harper equity-accounting-partition suit No. 7374 in favor of the John Moffett estate against Moffett Brothers partnership estate, as a result of said accounting (one of three major decrees) (W187, W192, W196), has been fully satisfied (C741, C743). Also the judgment in favor of Moffett Brothers against the Oklahoma partnership of Moffett Brothers Cattle, Land and Lumber Company for $101,000.00 has been satisfied (C726-734) (W859).

Petitioner Louise McGrew Moffett lists among her alleged "fictitious suits" suit No. 3348, *Helen Moffett* (now respondent Helen Weede) v. *Thomas S. Moffett, et al.*, filed in the District Court of Comanche County, Kansas, for 1127½ acres of land (12), which suit was thoroughly

adjudicated, and both Thomas S. Moffett and petitioner Louise McGrew Moffett were parties to said suit as shown by respondent Orlin A. Weede Exhibits 4 (W279), 5 (W296), 6 (W302), 7 (W304), 8 (W316) and respondent Helen Weede Exhibit 13 (W542). A copy of the Journal Entry of Judgment February 12, 1929, is set out herein as Orlin A. Weede Exhibit 4 (W279) (also, see W501). Said judgment was affirmed by the Kansas Supreme Court, *Moffett* v. *Moffett,* 292 Pac. 942, 131 K. 546 (year 1930), cer. den., 283 U. S. 826. Following said affirmance an amicable partition of the land involved was entered into by all interested parties and entered as a judgment of the court, styled "Journel Entry of Partition and Incidents Thereto," April 16, 1931, being set out herein as Orlin A. Weede's Exhibit 5 (W296) (also, see W501), in which equitable partition petitioner Louis McGrew Moffett received 240 acres (W297), and received partition deeds therefor and has continuously retained said lands to date, Helen Weede Exhibit 50 (W990). Petitioner Louise McGrew Moffett duly executed and delivered her deed confirming partition to Helen Moffett (now respondent Helen Weede), for the lands partitioned to said Helen Moffett in said Comanche suit, copy of which deed is set forth herein as Orlin A. Weede's Exhibit No. 6 (W302). Pages 20 to 23 of petitioner Louise McGrew Moffett's brief, in support of her petition for writ of certiorari in the United States Supreme Court, including specifications of errors, IN SAID COMANCHE SUIT is set out herein (W316-319). Copies of pleadings filed in said Comanche suit No. 3348, are set forth herein as Helen Weede Exhibit 13 (W542, W547, W552, W553).

Respondent Helen Weede, formerly Helen Moffett, widow of John Moffett, deceased, received but one-half of the estate of John Moffett, deceased, as appears from

the following: Harper suit 7374 (W121), Comanche suit 3348, Conclusions of Law 1 and 4 and Judgment, Orlin A. Weede Exhibit No. 4 (W292, 293); and in petitioner's suit No. 12178, Circuit Court of Clay County, Missouri, 1936, Order of Partition, Orlin A. Weede Exhibit No. 21-c (W353, 350). Respondent Helen Weede elected to take under the law and not under the will of John Moffett, deceased, in the States of Missouri, Kansas and Oklahoma following the death of John Moffett, August 23, 1927, and said elections were introduced in evidence in the above Harper suit No. 7374 (W93). See respondent Helen Weede Exhibits 9 (W526), 10 (W532). Said elections in Missouri and Kansas were introduced in evidence in said suit 3348, District Court of Comanche County, Kansas, Helen Weede Exhibits 11 (W533) and 12 (W534-542), and as shown by aforementioned Missouri Zombro case; Orlin A. Weede's Exhibits 15 (W335), 16 (W337, 17 (W340), 18 (W341), 19 (W343) and Helen Weede Exhibits 7 (W510) and 9 (W530, W531). The Kansas Supreme Court, with approval, cited the Missouri Zombro decision and said Comanche suit No. 3348 decision with reference to the elections of Helen Weede, formerly Helen Moffett, widow of John Moffett, deceased, in said Harper suit, *Clark, etc., Louise McGrew Moffett* (petitioner) v. *Helen Moffett, et al.*, 18 Pac. 2d 555, 136 K. 711 (C27, 28), as follows (l. c. 713) (also, see W345, 346):

> "His widow elected to take under the law (C27) * * * The will of John Moffett had been construed as it affected some of the beneficiaries, both by this court (*Moffett* v. *Moffett*, 131 K. 546, 292 P. 942) and by the Supreme Court of Missouri (*Zombro* v. *Moffett* (Mo.), 44 S. W. 2d 149). There was no longer controversy among the parties as to the share or interest which each of them should receive in the land to be partitioned, except as the same might be modified by the accounting." (l. c. 713.) (C28.)

Prior to the trial of said Harper suit petitioner Louise McGrew Moffett, in said Harper suit took the deposition of respondent Helen Weede, then Helen Moffett, in the office of appellant's counsel, M. J. O'Donnell, August 6, 1931 (W490), and Helen Weede testified therein that there never was an antenuptial agreement and that the unsigned so-called antenuptial papers were destroyed at the request of John Moffett, as set forth in respondent Helen Weede's Exhibit No. 1 (W490). After said deposition was taken August 6, 1931, appellant Louise McGrew Moffett, with said counsel, was in court many days (W180) and testified during the trial of said Harper equity suit No. 7374 in which suit petitioner was plaintiff (W215, 216), and had full opportunity to ask respondent Helen Weede, then Helen Moffett, when she testified, any further questions upon any subject (W180, W182). At end of Kansas Supreme Court opinion, *Clark, etc., Louise McGrew Moffett* v. *Helen Moffett,* 18 Pac. 2d 555, 136 K. 711, that court said:

> "• • • the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, • • •" (C39).

Petitioner took the deposition of respondent Helen Weede at Shawnee, Kansas, in suit 339,134, Circuit Court of Jackson County, Missouri, August 8, 1941, and as stated in respondent Helen Weede's Exhibit No. 7 (W512), the sum total of any questions asked regarding the nonexistent prenuptial agreement was one question to which an objection was made and sustained and thereafter no one asked further questions concerning same. Again petitioner took the deposition of Helen Weede in petitioner's Missouri damage suit No. 479,103 November 24, 1941

(Helen Weede Exhibit 2 herein) and again petitioner's counsel interrogated respondent Helen Weede, who again testified that there was no antenuptial agreement and that the unsigned copies of a so-called antenuptial agreement had been destroyed at the request of John Moffett (W494, W499, W500). Respondent Helen Weede's Exhibits Nos. 1 and 2 aforementioned were made a part of her Consolidated Defenses herein, but petitioner omitted these two exhibits from her printed record (98, 99).

All the assertions of petitioner Louise McGrew Moffett by conclusions and generalities concerning said nonexistent antenuptial agreement (7, 15, 146, 147) are alleged by her to have occurred prior to the trial of said Harper suit 7374 which was tried October 14, 1931, to January 13, 1932 (W180, W187), and suit 3348 in the District Court of Comanche County, Kansas, tried in 1929 (W280), and in petitioner's Clay County, Missouri, partition suit No. 12,178, March Term, 1936 (W352). In her affidavit, petitioner Louise McGrew Moffett states that she never saw any so-called antenuptial agreement (146, 147).

That respondent Helen Weede, formerly Helen Moffett, widow of John Moffett, deceased, was and is the owner of a one-half interest in said estate of John Moffett, deceased, was adjudicated many years ago in the many final judgments, decrees and orders by courts of competent jurisdiction, listed at the beginning of this Statement. Said adjudications are *res judicata* and cannot be collaterally attacked (83-94; 94-99; W2-7).

Petitioner Louise McGrew Moffett in the Howard fee case attempted to collaterally attack many final decrees, none of which were minimized, modified or changed. The Missouri Supreme Court in the Howard fee case passed upon only *one point,* to-wit: What, if any, additional Moffett Brothers fee should be paid to respondent B. C.

Howard. The Missouri Supreme Court so stated twice in said Howard fee case (42, 43). The Howard fee case, involving Mr. Howard's fee only, was an appeal from the Probate Court of Jackson County, Missouri, and probate procedure governed. Later, in petitioner's damage suit alleging conspiracy against the same parties as here (29), after said Howard fee case, the Missouri Supreme Court again stated that but *one point* was passed upon in said Howard fee case, that is, what additional Moffett Brothers fees Mr. Howard was entitled to (*Moffett* v. *Commerce Trust Co., et al.,* 193 S. W. 2d 588, l. c. 592; 354 Mo. 1098) (C79).

The Missouri Supreme Court in its last mentioned opinion (193 S. W. 2d 588, 591) subsequent to said Howard fee case opinion, in her conspiracy damage suit same as here, Paragraph 52 (29), ruled:

> "Judge Ridge sustained the demurrers on the sole ground of misjoinder of parties, but the demurrers also attacked the petition for misjoinder of alleged causes of action and for failure to state a cause of action. We think the reason assigned by the trial court is sufficient, *but his ruling can be sustained on the other grounds mentioned. Hartvedt* v. *Harpst,* Mo. Sup., 173 S. W. 2d 65, loc. cit. 68; *Bushman* v. *Barlow,* 321 Mo. 1052, 15 S. W. 2d 329, 330."

At l. c. 592 in same case, the Missouri Supreme Court held as follows:

> "Appellants (petitioner Louise McGrew Moffett) make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803 and the 'due process' and other provisions of the State

> and Federal Constitutions. Most, if not all, these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. *Moffett* v. *Moffett,* 131 Kan. 582, 292 P. 947, 77 A. L. R. 294; *Clark* v. *Andrews,* 136 Kan. 23, 13 P. 2d 294; *Clark* v. *Moffett,* 136 Kan. 711, 18 P. 2d 555; *Id.* 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528; *Moffett* v. *Robbins,* D. C., 14 F. Supp. 602; *Moffett* v. *Robbins,* 10 Cir., 81 F. 2d 431, *Id.,* 298 U. S. 675, 56 S. Ct. 940, 80 L. Ed. 1397. Appellants have not been denied due process. They have not only had their day in court, but their months and years."

The last mentioned decision of the Missouri Supreme Court is the same case as referred to by petitioner at paragraphs 52 and 53, Second Amended Complaint (29, 30, 31). The United States Supreme Court dismissed petitioner's appeal, 329 U. S. 629. Rehearing denied, 329 U. S. 827.

All of the matters alleged in petitioner's Second Amended Complaint including paragraphs 14, 20 and 21 (8, 9, 14, 15) relating to the Moffett Brothers books were thoroughly considered by the District Court of Harper County, Kansas, suit No. 7374, where the court made findings of fact and conclusions of law (W97-101) and rendered the decrees referred to in *Clark, etc., and Louise McGrew Moffett* v. *Moffett, et al.,* 18 P. 2d 555, 136 K. 711.

Petitioner Louise McGrew Moffett and Grace Torrance Clark in said Harper suit made no objections to the first paragraph of Finding of Fact No. 23 (W97), to-wit:

> "Prior to 1924 Moffett Brothers had not made separate partnership tax returns for the various Moffett partnerships to the Internal Revenue Department as seems to have been necessary and accordingly the accounting firm of Kopp and Copman, composed of William H. Kopp and R. E. Copman (respondents),

were employed by John Moffett and Thomas S. Moffett to set up new books for said Moffett Brothers partnership as of January 1st, 1924, carrying forward the various Moffett Brothers partnership accounts from the old joint books, called 'Moffett Brothers and Andrews Books,' and the said accounting firm entered upon such undertaking, and in so doing the said accountants received their instructions from the said John Moffett and the said Thomas S. Moffett, as partners, and also relating thereto they consulted with Helen Moffett, wife of John Moffett, and Louise McGrew Moffett, wife of Thomas S. Moffett."

It is elemental that findings of fact not objected to stand unimpeached. There are many such findings in the Harper suit, as is revealed by comparison of petitioner's "Motion to Modify, Change and Make Additional Findings of Fact" (W153-169) with the Findings of Fact as made by the Harper court (W89-153).

The District Court of Harper County, Kansas, made Finding of Fact No. 24 as to the Moffett Brothers partnership books (W99-100):

"The partnership books as set up on January 1st, 1924, continuously remained in the possession of John Moffett and Thomas S. Moffett, partners, until the date of the death of the said John Moffett, and that after the death of said John Moffett, Thomas S. Moffett had possession of all the books, papers and documents belonging to the partnership of Moffett Brothers until the date of his death at which time the possession of said books and documents passed to the possession of Louise McGrew Moffett who has since continuously kept possession of all the books, papers and documents belonging to the partnership of Moffett Brothers and the said Louise McGrew Moffett is now in the possession of the same, and produced them at the trial of this case.

These books, while they may not have been artfully and scientifically kept, were in the main substantially

correct and up to the time of the death of John Moffett they were regarded by all of the parties whose accounts were kept therein as reasonably reliable and dependable.

After the accountants set up the new books their report was fully considered by both parties, John Moffett and Thomas S. Moffett, and it does not appear that either one of them ever made any objections or complaints in regard to the books or in regard to the entries made therein, possibly with the exception of the item concerning the Guss transaction hereinafter mentioned.

When the accountants delivered their report which is marked 'Defendant's Exhibit 18' to Moffett Brothers, in their office in Kansas City, Missouri, the plaintiff Louise McGrew Moffett and the defendant Helen Moffett, were both present."

See petitioner Louise McGrew Moffett's requested Finding No. 24 (W158, 159).

See Finding of Fact 25 (W100) and petitioner's requested Finding 25 (W159).

The trial court in said Harper suit found (Finding 27, W101):

"The court finds that John Moffett in his lifetime and Thomas S. Moffett at all times prior to the death of John Moffett considered the accounts shown by the books as being correct, and the court further finds that the accounts in said books were substantially correct and that the status of such accounts is fairly reflected in the report prepared by the accountants, R. E. Copman and W. H. Kopp, under date of October 12, 1931, together with the exhibits attached thereto and introduced in evidence, and marked 'Intervenor Commerce Trust Company's Exhibit No. 8'. * * *"

During the trial (June, 1929) of said suit 3348 District Court of Comanche County, Kansas, petitioner Louise

McGrew Moffett testified (W320, 321) concerning her work on the Moffett Brothers' books prior to the death of John Moffett August 23, 1927, that she worked in the Moffett office for the first time in first part of 1923; that at first she was not working on the books of the current time but correcting errors and trying to separate accounts, making segregated accounts of the books in order to set up a new system of bookkeeping; that she is still in the Moffett office; that she took up work on the current books in the latter part of 1924 when Miss Jackman left; that she worked on the books of the office until the time of John Moffett's death (August 23, 1927); that the books she worked on were Moffett Brothers; Moffett Brothers & Andrews; Moffett Brothers & Andrews Commission Company, a corporation; Andrews, Moffett and Lewis; Moffett Brothers Cattle, Land & Lumber Company (Oklahoma partnership); that Mrs. John Moffett (now respondent Helen Weede) was in the office at the same time "working at the same things I was working at" and continued to work there until a couple of days before John Moffett's death (W320, 321).

Respondents William H. Kopp and R. E. Copman had been employed in 1924 (W98) by John and Thomas S. Moffett to set up new books for said Moffett Brothers partnership as of January 1, 1924 (Finding 23, W97, 98). When said accountants set up said books they submitted their reports (W404-407; W408-417; W501), which accountants' reports were in evidence in said Harper suit 7374 (W404, 405). Said accountants were familiar with the Moffett Brothers books and October 12, 1931 (W123) prepared Commerce Trust Company Exhibit No. 8 (W 123-151) which was introduced in evidence (Finding 27, W101) in said Harper suit 7374, the same being a summary of the accounts of John Moffett, Thomas S. Moffett and Moffett Brothers Cattle, Land & Lumber Company

(Oklahoma partnership) with the said Moffett Brothers partnership, including analysis of aforesaid accounts (W133-149). Said Exhibit 8 (W123-151) gives the Court a fair idea of the accounts and the setting up of the new books as of January 1, 1924. Said accountants (respondents here) Kopp and Copman were witnesses at the trial of said Harper suit 7374 (Helen Weede Exhibits 18 [W612-620], 19 [W620-632]). Petitioner Louise McGrew Moffett produced the said books which were introduced in evidence at the trial of said Harper suit 7374 (W99). Depositions of respondent William H. Kopp (W591-612) and respondent Helen Weede (W572-591) were taken in said Harper suit 7374 prior to the trial. Petitioner Louise McGrew Moffett's counsel interrogated respondent Helen Weede concerning so-called "work sheets" in connection with setting up of the new books, in said deposition (W574-577) where she testified that accountant Kopp made his own investigation of all the items in setting up the new books and wrote up his own work sheets and compiled his own figures in setting up the books, independent from any help from respondent Helen Weede (W576) and that the only work sheets that were prepared by respondent Helen Weede, then Helen Moffett, were in analyzing the farm operating accounts for income tax purposes (W577). Petitioner Louise McGrew Moffett presented to the Supreme Court of the United States her contentions concerning so-called "work sheets" and books (W632-636).

Most earnestly the Court is urged to read entire Finding 23 (W97-99).

The 46 Specifications of Error filed by petitioner Louise McGrew Moffett in the Supreme Court of Kansas as set forth in her Abstract of Record, cause 30826, July 13, 1932, on appeal from said final decrees in said Harper suit 7374, give the Court a definite idea of the broad scope

of petitioner's contentions therein (Helen Weede Exhibit 49; W984). Petitioner then attacked said final Harper decrees which had been affirmed by the Kansas Supreme Court aforesaid, in the United States Courts (14 Fed. Supp. 602; 81 Fed. 2d 431; Certiorari denied, 298 U. S. 675). Then petitioner collaterally again attacked said Harper decrees in the Missouri courts (193 S. W. 2d 588, 592; 354 Mo. 1098; Appeal dismissed 329 U. S. 669; Rehearing denied 329 U. S. 827).

The Hymer ranch in Kansas was owned by the Moffett Brothers & Andrews partnership (John Moffett, Thomas Moffett and L. B. Andrews) until November 13, 1917, when it was sold to E. T. Anderson under a sales contract (Helen Weede Exhibit 22; W637). Later, June 17, 1920, L. B. Andrews and Thomas S. Moffett, in writing, assigned their interest in the unpaid balance of said Hymer ranch sales contract to John Moffett (W637, 638). On September 18, 1923, John Moffett deposited $98,925.00 in the Moffett Brothers bank account (W646) which he received as a payment upon said contract (W645-647) and received credit for said sum (Finding 43, W109). Petitioner Louise McGrew Moffett testified in said Harper suit 7374 that she does not deny that said Hymer ranch proceeds, $98,925.00, was John Moffett's money (W646). Numerous interest payments were also made to John Moffett arising from said Hymer ranch transactions (W646, 647; W110) and in each instance the money was deposited in the bank account of Moffett Brothers and John Moffett was given credit for same (W110). John Moffett accepted from E. T. Anderson in partial satisfaction of the balance due upon aforementioned Hymer ranch sales contract three notes and second mortgages, all dated July 16, 1923, payable to John Moffett, in the total amount of $43,550.00 (C519) (see 516-519). Following the death of John Moffett, August 23, 1927, Thomas S. Moffett (the husband of

petitioner) as administrator of Moffett Brothers in Kansas made application to the Probate Court of Chautauqua County, Kansas, for authority to pay out of the Moffett Brothers partnership funds to himself as executor of the estate of John Moffett in Missouri, the sum of $22,491.61 to protect the said second mortgages on the Hymer ranch, and procured an order therefor dated May 10, 1928 (Orlin A. Weede, Exhibit 11, W321-325), which order referred to the indebtedness of Moffett Brothers partnership estate to John Moffett estate, and also the necessity of the transfer of said sum of $22,491.61 so that said money could be used by the John Moffett estate to purchase the equity in the Hymer ranch in order to preserve said second mortgages (W324, 325). Thomas S. Moffett as executor of the John Moffett estate in Missouri made application for and procured an order in said estate in the Probate Court of Jackson County, Missouri, April 7, 1928, approving his acts in preserving the equity in said Hymer ranch lying in Morris and Chase Counties, Kansas, in order to protect the John Moffett estate second mortgages held on said lands (C677-679; C680). Said Thomas S. Moffett signed and acknowledged June 11, 1928, a declaration of trust that the John Moffett estate was the owner of three second mortgages upon said Hymer ranch and that since the death of said John Moffett said lands were purchased by Thomas S. Moffett, acting as executor of the John Moffett estate, and therefore he, Thomas S. Moffett, held the legal title to said Hymer ranch in trust for the estate of John Moffett, deceased, because "the money paid for such lands was money belonging to the estate of John Moffett, deceased" (W329). On June 2, 1928, petitioner Louise McGrew Moffett, wife of said Thomas S. Moffett, signed and acknowledged the following statement as a part of the above declaration of trust:

"The lands composing the Hymer ranch as mentioned in the foregoing declaration of trust and conveyed to Thomas S. Moffett as therein recited were purchased with the money of the estate of John Moffett, deceased, and said lands are owned by the estate of John Moffett, deceased" (W329, 330).

Thomas S. Moffett as executor asked the court for directions, whereupon the said Probate Court on February 7, 1929, entered its order ordering said Thomas S. Moffett to convey said Hymer ranch to said Commerce Trust Company, his successor (C517). Thomas S. Moffett and petitioner Louise McGrew Moffett signed and acknowledged on February 26, 1929, a special warranty deed to Commerce Trust Company, conveying said Hymer ranch located in Morris and Chase Counties, Kansas, to the respondent Commerce Trust Company. Photostatic copy of said special warranty deed is set out herein (W330-333). The first and second mortgages on said Hymer ranch are referred to therein (W331).

ALL OF THE FOREGOING MATTERS AND THINGS RELATING TO SAID HYMER RANCH WERE CONSIDERED IN THE SUIT 7374 IN THE DISTRICT COURT OF HARPER COUNTY, KANSAS, Finding 43 (W109, 110). Also see Helen Weede Exhibits 22 (W637), 25 (W645); Orlin A. Weede Exhibit 13 (W328).

Petitioner Louise McGrew Moffett in her own handwriting entered the items on the account of the estate of John Moffett with Moffett Brothers partnership estate, upon the Moffett Brothers books (W326) (introduced in evidence in said Harper suit 7374), subsequent to the death of John Moffett August 23, 1927, of the following amounts: $5,891.61, $1,500.00, $15,000.00 and $100.00, as shown upon the photostatic copy of said ledger page (W327), totaling the amount $22,491.61 for which amount

said Thomas S. Moffett procured order in the Probate Court of Chautauqua County, Kansas (W321-325). Petitioner repeatedly herein calls the account of John Moffett with Moffett Brothers "void" notwithstanding the many adjudications cited herein that said account is valid.

Petitioner sets out two photostatic copies of alleged property statements (417, 419) by which she tries to establish that John Moffett recognized that Moffett Brothers & Andrews owned the Hymer ranch contract in 1921 and 1922. These statements disclose that same include all of the Moffett Brothers partnership lands; Thomas S. Moffett's house; L. B. Andrews' house; Moffett Brothers Cattle, Land & Lumber Company partnership lands in Oklahoma; Andrews, Lewis and Moffett partnership land in Meade and Logan Counties, Kansas; also 4183 acres of land in Barber County, Kansas, which petitioner would claim belonged to Thomas S. Moffett individually. The purpose of the statements was apparently not to establish the ownership of the property listed, but to indicate to banks, or someone, the ability of the partnership of Moffett Brothers & Andrews and the partners individually and collectively, and otherwise, to pay.

The E. T. Anderson sales contract indicates E. T. Anderson owned the Hymer ranch in 1921 (W637, 638). As to the papers listed by appellant as "Index-Filing Cabinet" (156) made in 1921 by Helen Weede, all are old papers that belonged to Moffett Brothers & Andrews when the partnership owned the ranch before selling to E. T. Anderson November 13, 1917, under said sales contract. The papers belonging to John Moffett in acquiring all the interest in said sales contract and subsequent transactions as to same are not mentioned in said "Index-Filing Cabinet." The letter (141) written on the stationery of Beardsley & Beardsley for signature of Helen Weede, then Helen Moffett, is consistent with her position that

said second mortgages were the property of John Moffett. Said letter was considered in evidence in said Harper suit (W647, 648), and objection sustained that the letter was never acted upon (W648). Instead, payments on account were made to the John Moffett estate by Moffett Brothers, as shown by the photostatic copy of ledger page (W327) where the payments on account are shown in the handwriting of petitioner Louise McGrew Moffett between the dates August 31, 1927, and April 2, 1928 (W326, 327).

As to petitioner's allegations in paragraphs 27 to 32 Second Amended Complaint, as to alleged lost title paper, Motion To Dismiss of Respondent Orlin A. Weede (88-90) shows that at most petitioner is attempting to make an insinuation and that all of the petitioner's allegations assert that the incidents complained of occurred prior to the trial of said Comanche suit 3348 (W449) (W569). These exhibits show that said Orlin A. Weede was admittedly never in possession of said deeds to Comanche County lands but that Thomas S. Moffett was in possession of said deeds (W489, 490); that said deeds were in evidence in said Comanche suit (Finding 6, W289; W292; W451). Petitioner's abstract in the Kansas Supreme Court made no reference to any lost deeds or title papers (W304). Petitioner's affidavit says reason no objection was made in Comanche trial concerning any lost title paper was because before the trial Mr. Watson, her attorney, said they did not know the contents of the "missing title paper" and for said reason refused to introduce any evidence as to Mr. Weede's alleged acts concerning same in the Comanche suit (W163). See Journal Entry of Judgment (W279), Journal Entry of Partition (W296), and deed confirming partition of petitioner to respondent Helen Weede (then Helen Moffett) (W302). T. S. Moffett had based his claim to one-half of John Moffett's Co-

manche County, Kansas, land upon an oral contract (W550). The Court held there was no oral contract (W290). See pleadings filed in said Comanche suit 3348 (W542-566). See written agreement between John Moffett and T. S. Moffett (W564, 565). In the Comanche suit T. S. Moffett attempted to take one-half of John Moffett's land mentioned in said contract in addition to his own (W545; W547-553; W553-564).

Petitioner has called Orlin A. Weede's Exhibit 35 (W433) a "false affidavit" in its entirety, merely because of an error in stating petitioner's counsel, E. C. Wilcox, OKd the Journal Entry of Judgment (W434) signed by Judge Hay and filed March 5, 1932, in said Harper suit 7374, whereas, said E. C. Wilcox was present but did not OK said entry, and this is the only error in said Exhibit 35, which was corrected in Orlin A. Weede Exhibit 36 (W440, 443, 445), of which petitioner makes no mention. Obviously, the presence of or the lack of an OK cannot affect the validity of a judgment of the court (W205).

Said Orlin A. Weede Exhibit 36 sets forth the facts, showing that Mr. Watson, petitioner's counsel, had within his possession prior to March 5, 1932, date of hearing Commerce Trust Company Motion to change Conclusion of Law No. 11, two forms of Journal Entry so that one could be used if the court overruled said Motion and to use the other in the event the court sustained said Motion. The Court sustained said Motion and said E. C. Wilcox placed his OK upon the order sustaining same, filed March 5, 1932 (W443; C552-555). This change, March 5, 1932, in Conclusion of Law No. 11 was made within term time as original judgment was rendered January 13, 1932, and the Court takes judicial notice of Section 20-1024 R. S. Kans. 1923. This was the only change made in the

Harper decrees after judgment was rendered January 13, 1932, and consisted in substituting the domiciliary administrator for ancillary administrator in receiving moneys due Moffett Brothers (C553, 555); (14 Fed. Supp. 602).

The Moffett Brothers accounting situations in Harper suit No. 7374 are described in Supplemental Separate Amended Answer of Helen Moffett (now respondent Helen Weede), filed in said suit February 19, 1931, asking for an accounting (W1019-1037). Also see her Special Answer filed therein June 15, 1931 (W828). Petitioner Louise McGrew Moffett filed her pleadings in said Harper suit (W380-382 adopting W363-380; W380-393). See W215, 216.

ARGUMENT.

I.

Res Judicata.

This is the fifth time that petitioner has carried the Moffett litigation complained of herein to the Supreme Court of the United States, and in each instance Your Honorable Court either denied or dismissed her petitions, to-wit:

Comanche County, Kansas, case, *Moffett* v. *T. S. Moffett, Louise McGrew Moffett* (petitioner), *et al.*, 292 P. 942, 131 K. 546 (1930); Certiorari denied, 283 U. S. 826, 75 L. Ed. 1440, 51 S. Ct. 351 (No. 700).

Harper County, Kansas, Equity-Accounting-Partition suit: *Moffett* v. *Moffett*, 292 P. 947, 131 K. 582 (1930); *Clark, Louise McGrew Moffett* (petitioner) v. *Helen Moffett* (now respondent Helen Weede), *Commerce Trust Company* (now respondent), *et al.* (Jan., 1933); Certiorari denied, 290 U. S. 602, 290 U. S. 642 (No. 181).

Petitioner's attacks in Kansas and Tenth Circuit UNITED STATES COURTS on decrees of District Court of Harper County, Kansas (next before cited); *Louise McGrew Moffett* (petitioner) v. *R. O. Robbins, etc.*, 14 F. Supp. 602 (1935); *Louise McGrew Moffett* (petitioner) v. *R. O. Robbins, etc.*, 81 F. 2d 431 (Jan., 1936); Certiorari denied, 298 U. S. 675 (No. 918).

Petitioner's damage suit in Missouri state courts against same parties as now which petitioner says was same as instant suit (see petitioner's Record, p. 29): *Louise McGrew Moffett* (petitioner) v. *Commerce Trust Company, Helen Weede, et al.*, 193 S. W. 2d 588 (especially note l. c. 592), 354 Mo. 1089 (Feb., 1946); Appeal dismissed, 329 U. S. 669, 91 L. Ed. 30, 67 S. Ct. 82 (No. 318 October Term 1946); Rehearing

denied, 329 U. S. 827. For scope of this conspiracy damage suit prosecuted by petitioner through the Missouri state courts, see petitioner's Jurisdictional Statement (W862-905) on appeal to the United States Supreme Court, filed July 19, 1946, No. 318, October Term, 1946, wherein same assertions and contentions were made by petitioner as now, and by her same counsel, M. J. O'Donnell, who has been her counsel in all of the aforegoing litigation.

In instant suit, the United States District Court dismissed petitioner's amended complaint in December, 1946 (75 F. Supp. 303), but permitted petitioner to file her second amended complaint herein, and aforementioned Court dismissed with prejudice petitioner's second amended complaint December 1, 1949 (87 F. Supp. 438). The United States Court of Appeals, Eighth Circuit, affirmed (187 F. 2d 242). Now herein petitioner seeks a writ of certiorari. This is the fifth time petitioner has carried Moffett litigation to the Supreme Court of the United States and the fourth time in Your Honorable Court petitioner has attacked the final Harper County, Kansas, decrees above referred to. It would seem that there should be an end to this litigation and that the petition for writ of certiorari herein should be denied. The Missouri Supreme Court stated in petitioner's conspiracy damage suit aforementioned that petitioner has not only had her day in court but her "months and years" and then set out citations (193 S. W. 2d l. c. 592).

Note how studiously petitioner has tried to keep the aforegoing prior litigation citations from Your Honorable Court in her petition and brief in support thereof. Same appear on the face of petitioner's second amended complaint as already pointed out in the statement set forth at the beginning of this brief. Same are *res judicata.*

The Court of Appeals opinion herein (187 F. 2d l. c. 246) in this connection stated:

> "In regard to all the state court judgments now under attack, the inference is inescapable from the complaint that in each case the plaintiff (petitioner) or Thomas S. Moffett appeared, was represented by counsel, was accorded a complete trial, in all of the actions enjoyed the right of appeal, and in many of them exercised it without avail."

***Res judicata.* There must be an end to litigation. Final decrees, judgments and orders of courts of competent jurisdiction are conclusive not only as to all matters which were decided but as to all matters which might have been decided. Petitioners are not at liberty to split up their claim and prolong litigation. *Guettel* v. *United States,* 8 Cir., 95 Fed. (2d) 229, 230-232; Certiorari denied 305 U. S. 603, 83 L. Ed. 383, 59 S. Ct. 64. This law applies to adjudications complained of by petitioners.**

The United States Supreme Court has spoken plainly that there must be an end to litigation, in *Riley* v. *New York Trust Co.,* 315 U. S. 343, relating to full faith and credit and *res judicata* concerning estate and probate proceedings, and holds that "matters once decided between adverse parties in any State or territory are at rest." *Fauntelroy* v. *Lum,* 210 U. S. 230, 236, is a celebrated case relating to a Missouri Judgment, holding that full faith and credit be given decisions of sister states.

To same effect—*Union Nat. Bk.* v. *Lamb,* 337 U. S. 38, and *Heiser* v. *Woodruff,* 66 S. Ct. 853, 857.

United States v. *Munsingwear, Inc.,* 71 S. Ct. 104, 105, 106:

> "We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48-49, 18 S. Ct. 18, 27, 42 L. Ed. 355:

'The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'

And see *Cromwell* v. *County of Sac,* 94 U. S. 351, 352, 24 L. Ed. 195; *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. 591, 597-598, 68 S. Ct. 715, 719, 92 L. Ed. 898."

See *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, and *Stoll* v. *Gottlieb,* 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104.

Mendez & Co. v. *General Motors Corp.,* 161 Fed. (2d) 695, 698, follows the Eighth Circuit case, *Guettel* v. *United States, supra,* holding that all claims of a litigant, legal or equitable, must be presented and that a litigant is not at liberty to split up his demand because such practice would lead to endless litigation.

Martin v. *Broderick,* Tenth Circuit, 177 Fed. (2d) 886, 887, rules to the same effect, citing *Guettel* v. *United States, supra.* Said Guettel case has been cited repeatedly by courts generally in holding that there must be an end to litigation. *Buffalow* v. *Plainfield Hotel Corp.,* 177 Fed. (2d) 425, 427, to same effect.

Wilson v. *United States* (8 Cir.), 166 Fed. (2d) 527, holds that the doctrine of *res judicata* is one of the most fundamental doctrines of all courts and that there must be an end to litigation.

Moffett v. *Robbins,* 14 Fed. Supp. 602, in petitioner's suit attacking the Harper suit 7374 decrees, holds that it is well established that when a party has a defense which he could have interposed and was not prevented from doing so by accident, fraud or mistake, he cannot reserve that defense to some other time or forum and thus develop a multiplicity of suits and prolong litigation, citing an Eighth Circuit case, *Smith* v. *Apple,* 6 Fed. (2d) 558, and other cases. *Moffett* v. *Robbins, supra,* was sustained, 81 Fed. (2d) 431; certiorari denied, 298 U. S. 675.

White v. *Sinclair Prairie Oil Co.,* 139 Fed. (2d) 103, 107, ruled that a party is not at liberty to split up a demand and prosecute it piecemeal and leave the rest to be presented in a subsequent suit if the first fails, citing many cases.

The opinion below by the Court of Appeals for the Eighth Circuit specifically mentions how petitioner has been afforded a complete hearing in each instance in the state courts where final adjudications were rendered (187 F. 2d 242, 244, 246, 248) (Pro. 2, 6, 7, 11). Also the District Court below held:

> "The purport of plaintiff's complaint is to seek from the federal courts a policing of the state courts.
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>
> All the averments of the complaint show that the challenged acts or decisions were done or rendered in the regular course of judicial procedure, after due process." (87 F. Supp. 441.) (778, 779.)

Respondents Helen Weede and Orlin A. Weede have also provided the Court with numerous court records and official citations disclosing the many final judgments, decrees and orders of courts of competent jurisdiction which

petitioner is attempting herein to again relitigate. These are indicated in INDEX to Supplemental Record of respondents Helen Weede and Orlin A. Weede, and are set out in said Supplemental Record. Respondents Helen Weede and Orlin A. Weede earnestly ask the Court to note said INDEX.

Motion to dismiss is proper as to defense of *res judicata*. In instant suit prior adjudications appear on face of Second Amended Complaint. Undisputed court records also show *res judicata*.

Bloomfield Ave. Corp. v. *Montclair Mfg. Co., Inc.*, 90 F. Supp. 1020, l. c. 1021:

> "The court said that the pleadings and judgments were properly treated as a plea of *res judicata* by the District Court. In a footnote the court stated that a defense of this kind may be raised either by motion to dismiss or in the answer. See: 2 Moore's Federal Practice, 2nd edition, par. 8.28 and par. 12.09. In this case both parties have had the opportunity to submit, and have submitted, affidavits from which it clearly appears that there is no genuine issue as to a material fact so far as the defense of *res judicata* is concerned."

II.

Petitioner has already resorted to equity in attacking the final decrees in Suit 7374, District Court of Harper County, Kansas, wherein she alleged conspiracy-fraud as to same parties and situations as here.

Louise McGrew Moffett (Petitioner), *etc.*, v. *Robbins, etc.*, 14 F. Supp. 602; 81 Fed. (2d) 431; Certiorari denied, 298 U. S. 675.

In petitioner's equity suit in the United States courts, attacking final decrees in suit 7374 of District Court of Harper County, Kansas, she litigated numerous identical allegations as here, as set forth in her TRANSCRIPT OF RECORD in TENTH CIRCUIT and UNITED STATES SUPREME COURT (Orlin A. Weede Exhibit 1, W36-261), to-wit: conspiracy (W53, 54, 64, 66, 80, 86); sales of Kansas lands (W64, 65); "void judgments" in Harper suit 7374 (W52, 53, 67); "false analysis of books" (W59); "work sheets" "prepared by Helen Moffett" (W59); "fraud on the Court" (W68); "conspirators" (W80); alleged "false claim" by John Moffett estate vs. Moffett Brothers (W81, 84); "Commerce Trust Company failing to file motion for new trial" (W71); "Kingman trip by B. C. Howard and Orlin A. Weede" and alleged interviews with Judge Hay (W84, 87); change in Conclusion of Law No. 11 (W88); depositions of B. C. Howard and Orlin A. Weede (W63; W87, 88); change in Journal Entry of Judgment to conform to order changing Conclusion of Law 11 (W88); charges against trial judge, Harper suit (W61; W65, 66; W213, 214); also fraud (W60-71), and other allegations as here throughout her Bill. The Tenth Circuit opinion appears W250-259.

III.

There was an adversary trial in Harper suit.

That there was an adversary trial in the said Harper suit 7374, clearly appears in opinion of petitioner's suit against R. O. Robbins, 81 Fed. (2d) 437 (C46), which paragraph concludes:

> "In these circumstances the mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves."

IV.

Petitioner has had her days in court.

Note contentions in petitioner's points relative Jurisdiction (W317, 318) and Specifications of Error (W318, 319) in the United States Supreme Court in her Petition for Writ of Certiorari No. 700, year 1930, in said Comanche County, Kansas, litigation, 292 Pac. 942, 131 K. 546 (W316, 319). Certiorari denied 283 U. S. 826.

Petitioner's Petition for Writ of Certiorari in the United States Supreme Court, No. 181, year 1932, in said Harper suit (W649) shows what petitioner submitted to that court, attacking the Harper final decrees, 18 Pac. (2d) 555, 136 K. 711. Certiorari denied, 290 U. S. 602, 290 U. S. 642.

The Petition for Writ of Certiorari by petitioner in the United States Supreme Court, No. 918, year 1935, in said Robbins case attacking 14 Fed. Supp. 602, 81 Fed. (2d) 431 (W672), shows petitioner's many contentions made there same as now. Certiorari denied, 298 U. S. 675. Note Brief of Respondent in opposition to petitioner's said Petition for Writ of Certiorari (W711-785) where law is set forth applicable to the identical situations petitioner

again presents here. See INDEX (W712-715) to said Brief, applicable here.

Petitioner's Statement as to Jurisdiction in the Supreme Court of the United States, No. 318, year 1946, appeal from decision of Missouri Supreme Court, 193 S. W. (2d) 588, 592, petitioner's conspiracy-damage suit, stated by her to be the same as here (29), wherein it was held petitioner has had her days and years in court (193 S. W. (2d) 592), sets forth how petitioner presented her alleged federal questions (W862-905). In that suit petitioner asked the United States Supreme Court for a full hearing on the merits (W905-921). Petitioner's Motion for Rehearing in said conspiracy-damage suit is set out herein (C448-504). Appeal dismissed, 329 U. S. 669. Rehearing denied, 329 U. S. 827.

V.

Conclusiveness of decree confirming sale. A decree final and not appealed from affirming a sale is effectual as against the parties to suit.

Mackenzie v. *A. Englehard, etc., Co.*, 266 U. S. 131.

Petitioner does not state she was prevented in any manner whatever from setting up any defenses.

Pewabic Mining Co. v. *Mason*, 145 U. S. 349, holds that it is the policy of the law not to set aside a sale of property for trifling causes; and further holds: "Litigants prolonging litigation • • • cannot complain if it takes place finally in a time of financial depression."

VI.

Fraud allegations cannot be used as an excuse to obtain further hearing upon matters which were or could have been brought before a court to make case or defense, or because parties neglected to litigate such matters in original case.

Winchell v. *Gaskill*, 190 S. W. (2d) 266, 354 Mo. 593.
See *Odom* v. *Langston*, 75 F. Supp. 651, re relitigation.
Schatte v. *International Alliance, etc.*, 182 F. (2d) 158.

VII.

Fraud-conspiracy allegations must be specific and cannot be plead by generalities and conclusions. Motion to dismiss does not admit generalities or conclusions as to fraud allegations.

Rule 9(b) Federal Rules of Civil Procedure.
Judge Reeves in instant suit, 87 Fed. Supp. 438, 441 (779).

Fogg v. *Blair*, 139 U. S. 118, 127, holds that allegations of generalities are not admitted on demurrer.

Pennie v. *Reis*, 132 U. S. 459.
United States v. *Aines*, 99 U. S. 34-45.
Louise McGrew Moffett (petitioner) v. *Robbins*, 14 Fed. Supp. 602, 604.
Browning v. *Blair*, 218 P. (2d) 233, 169 K. 139.

Lucas v. *Federal Reserve Bank*, 59 Fed. (2d) 619, holds that the use of adverbs "unlawfully," "wrongfully" and "falsely" do not add anything to the pleading.

Federal jurisdiction does not arise because averment is made as to the existence of a constitutional question.

A genuine and substantial federal question must be presented by the complaint. It is conceded that diversity of citizenship is not the basis of instant suit.

Polhemus v. *American Medical Assn.*, 145 Fed. (2d) 357, 359.
Campo v. *Niemeyer*, 182 F. (2d) 115, re Conspiracy-civil rights.
Brictson v. *Woodrough*, 8 Cir., 164 F. (2d) 107, re "Judges"; "Conspiracy."

VIII.

Respondent Helen Weede's interest in John Moffett estate has been repeatedly adjudicated in courts of competent jurisdiction, following her elections to take under the law. In deposition in Harper Suit 7374 prior (1931) to trial of that suit appellee Helen Weede testified there never had been an antenuptial agreement.

Because of lack of space in this brief the STATEMENT herein is hereby referred to and hereby adopted for all purposes of this argument, relating to the one-half interest of respondent Helen Weede, formerly Helen Moffett, widow of John Moffett, deceased, in the estate of said John Moffett, and that there was no antenuptial agreement (W490-494; W494-500), and as to her duly filing her elections in the States of Missouri (W534, 536), Kansas (W526; W532; W533; W534-542), and Oklahoma (W532), (W345, 346). Said one-half interest in said estate was adjudicated in the following suits to which petitioner Louise McGrew Moffett, her husband, or both, were parties: *Moffett* v. *Moffett*, 292 Pac. 942, 131 K. 546 (W292); *Moffett* v. *Moffett*, 292 Pac. 947, 131 K. 582 (C25); *Clark* v. *Moffett*, 18 Pac. (2d) 555, 136 K. 711 (W121); *Zombro* v. *Moffett*, 44 S. W. (2d) 149 (W335, 338, 340, 344); *Louise McGrew Moffett* v. *Helen Moffett*,

et al., No. 12178, Circuit Court, Clay County, Missouri (partition) (W353-355). The above final adjudications are now *res judicata* and cannot be collaterally attacked herein.

Vanek v. *Vanek,* 180 P. 240, 104 K. 624, repeatedly cited by petitioner, which was a case to set aside a will, is a strong case in favor of respondent Helen Weede as shown by Part 2 of the opinion, also Par. 2 of Syl. which reads:

> "2. Will of Bachelor-Construction of Statute. The provision of the statute that 'any married person having no children may devise one-half of his or her property to other persons than the husband or wife' (Gen. Stat. 1915, Sec. 11791), applies to the operation of wills made before marriage as well as after."

Said Vanek opinion cites with approval *Noecker* v. *Noecker,* 71 Pac. 815, 66 K. 347, and *Breen* v. *Davies,* 146 Pac. 1147, 94 K. 474, both of which cases clearly sustain the position of respondent Helen Weede herein. The widow of James Vanek in the Vanek case received one-half of his estate, as shown by the "receipt" executed by the widow (615) and the Order of Dischargee (616) in the Probate Court. The Brief of Appellants (W922-936) *as filed in said Vanek case* wholly refutes the contentions of appellant. Said Brief recites (W934):

> "There is no contention on the part of the appellants, that the will of James Vanek, is operative to more than one-half of his estate, the appellee's inchoate interest, in her deceased husband's estate is fixed by the statute, and no act of his, either before or after the marriage can divest her of that interest."

Petitioner attempts to make much of a purported letter from John Moffett to T. S. Moffett in 1921 (355). Appel-

lant's lawyer, A. E. Watson, in June, 1929, tore off and introduced the top of this letter in evidence (W570) in said Comanche suit to which both petitioner and respondent Helen Weede were parties, and now attempts to use the lower part of the letter before this Court. See testimony of T. S. Moffett (W569, 570). See statements of Mr. O'Donnell to District Court (W1000-1002). The letter says nothing about any antenuptial agreement (W569) (355). It is obvious petitioner or T. S. Moffett, her husband, had above letter at the time of John Moffett's death August 23, 1927, and also that they had said letter at said Comanche trial (W569, 570), June, 1929 (W281), which was before the trial of Harper suit 7374, 1931 (W180).

IX.

As to so-called "fictitious suits," the settled policy of federal courts is not to interfere with normal functioning of state courts in matters of which state courts have jurisdiction.

Casatari v. *General Finance Corp.*, 173 Fed. (2d) 798, l. c. 800, 801:

> "It is the settled policy of the Federal Courts not to interfere with the normal functioning of the state courts in matters in which they have jurisdiction. 28 U. S. C. A. No. 2283, Act of June 25, 1948; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100, 37 A. L. R. 967; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17, 46 S. Ct. 1."

X.

Protection offered by Fourteenth Amendment is only against acts of states and does not apply to acts of individuals.

Wilcox v. *Horan*, 178 Fed. (2d) 162, 164.
Bottone v. *Lindsley*, 170 Fed. (2d) 705; Cer. den. 336 U. S. 944.

See *Collins* v. *Hardyman*, 71 S. Ct. 937.

XI.

Questions as to whether administrator in Kansas or Missouri was a proper party to take judgment in Harper suit is a question of local law or practice. Decision by state Supreme Court is controlling.

Parker v. *McLain,* 237 U. S. 469 (W743, 744).
Riley v. *N. Y. Trust Co.,* 315 U. S. 343.

There is nothing in the concept of due process which demands that petitioner be afforded a second opportunity to litigate the existence of jurisdictional facts.

Chicago Life Ins. Co. v. *Cherry,* 244 U. S. 25.
Baldwin v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522, 525.

Procedure similar to instant suit was used in *Smith* v. *Apple,* 6 Fed. (2d) 559, Eighth Circuit, where there was also an equity partition-accounting involved. *Coleman* v. *Apple,* 8 Cir., 298 Fed. 718, 720, 721, concerning partnership, involving property in Kansas and Oklahoma, and defining jurisdiction, and holding that a court of equity having authority to act upon the person may indirectly act upon real estate in another state, through the instrumentality of this authority over the person.

Petitioner presented this identical question to the Supreme Court of the United States, October term, 1933, No. 181, in said Harper suit, also, as herein, citing to Your Honorable Court *Helme* v. *Buckelew; McMaster* v. *Gould, and Thornburn* v. *Gates.* After the United States Supreme Court had denied petitioner's petition for Writ of Certiorari, she filed her MOTION OF PETITIONERS FOR PERMISSION TO FILE SUGGESTIONS SETTING FORTH REASONS SHOWING THAT ORDER DENYING CERTIORARI HEREIN ON OCTOBER 9,

1933, SHOULD BE REVOKED AND THE WRIT GRANTED, citing aforementioned cases again, as herein (W418-421). Certiorari denied, 290 U. S. 602, 290 U. S. 642.

Again petitioner in October term, 1935, No. 918, presented the same question and cited the same cases, *Helme* v. *Buckalew, etc.,* in her Petition for Writ of Certiorari in her suit against R. O. Robbins on appeal from 81 F. (2d) 431, and 14 F. Supp. 602, aforementioned (W673, W679, W696, W702, W703-704, W708); and perhaps thinking the court might not recognize the identical argument used in her Motion to Revoke the Denial of her Petition for Writ of Certiorari in the Harper suit, abovementioned, petitioner, through her same attorney, Martin J. O'Donnell, copied the argument again in her Petition for Writ of Certiorari at pages 36 to 47 in her said Robbins case. See comment concerning this (W722). Your Honorable Court again denied petitioner's petition for Writ of Certiorari, 298 U. S. 675.

The third time petitioner with same counsel again presented the same question (W900) to the United States Supreme Court was in her appeal, No. 318, October term, 1946, from the decision of the Missouri Supreme Court, in her conspiracy damage suit against same parties as here, 193 S. W. (2d) 588, 592. Said question was presented in petitioner's jurisdictional statement in said conspiracy damage suit (W900), said entire jurisdictional statement with the many questions as herein being set out herein (W862 to 905) of which the United States Supreme Court takes judicial notice as it is a part of the Court's Records. Petitioner's said Appeal was dismissed: 329 U. S. 669; Rehearing denied, 329 U. S. 827.

Now for the fourth time petitioner presents the above question again, on her petition for Writ of Certiorari, attacking the decision of the Court of Appeals for the

Eighth Circuit, 187 F. (2d) 242, which affirmed the United States District Court, 87 F. Supp. 438. Prior to that the District Court had also dismissed petitioner's Amended Complaint, 75 F. Supp. 303.

XII.

Decisions of lower courts herein are correct. No conflict.

On question as to how the District Court arrived at its decision, just cited, in dismissing petitioner's Second Amended Complaint herein, it is submitted that sufficient references to aforementioned prior litigation appear on the face of said Second Amended Complaint so that the Court of Appeals had no difficulty, and the United States Supreme Court now has no difficulty, in recognizing that petitioner has repeatedly had her days in court after due process, and that the pending state litigation complained of provides no federal question. Also, that the decisions of the lower courts are correct. The numerous unfounded and baseless attacks by generalities and conclusions against the many courts and judges lack anything specific that will blacken the name or reputations of those faithful public servants for performing their duty in presiding over the long list of trials and court proceedings which petitioner and her same attorney have prosecuted. Surely the Constitution and Civil Rights Act do not serve to permit relitigation time and again because a litigant is disappointed or disgruntled, after having been fully heard by courts of competent jurisdiction. The Court of Appeals for the Eighth Circuit made its position clear on this, and a mere jerking from its connection of the incidental statement of the Court of Appeals "* * * *assuming* that the state court proceedings were not within jurisdiction of the courts which decided them * * * they were not void but, at most, erroneous" does not destroy what the court

said and held. The opinion of the Court of Appeals is unmistakable and sound (Pro. 1-13). Also, 187 F. (2d) 242. Following the above quoted part objected to by petitioner, the Court of Appeals said: "Nothing in the Civil Rights Act gives a Federal Court jurisdiction to review them."

Petitioner has not shown any suit or proceeding attacked by her herein where the court or courts did not have jurisdiction over the parties and subject matter in each instance. Regularity is presumed. It affirmatively appears as hereinbefore set forth that the courts have had such jurisdiction and that the many courts have accorded petitioner her full days, months and years in court. The Missouri Supreme Court in petitioner's fraud-conspiracy suit against same parties as here so stated (193 S. W. (2d) l. c. 592; appeal dismissed, 329 U. S. 669; rehearing denied, 329 U. S. 827). Immediately preceding the above part of the opinion of the Court of Appeals criticized by petitioner appears the following (187 F. (2d) l. c. 248; Pro. 11):

> "Plaintiff's allegations that the decisions of the various state courts in litigation in which she was involved were void or arbitrarily or willfully made merely expresses an opinion not uncommon among defeated litigants, and, as appears from the face of the complaint, not entertained by the State Supreme Courts which reviewed the judgments. The charge that the state court judgments were intentionally and purposefully against plaintiff, aside from the fact that the language used would apply equally as well to the decision of any court, right or wrong, adds nothing to the force or effect of the complaint. *Snowden* v. *Hughes,* 321 U. S. 1."

XIII.

In Howard fee case Missouri Supreme Court passed on but one point: What, if any, additional fee should be allowed respondent B. C. Howard.

Petitioner emphasizes the Howard fee case. Respondents Helen Weede, Orlin A. Weede, Wm. H. Kopp and R. E. Copman were not parties to that suit. Said suit originated in the Probate Court of Jackson County, Missouri, and solely concerned a claim of respondent B. C. Howard for attorney fees for services rendered by him to Commerce Trust Company as administrator of the Moffett Brothers partnership estate. Therefore, probate procedure controlled. The Probate Court allowed him $9,000 ($7,700 and $1,300) (652-653), and petitioner Louise McGrew Moffett appealed to the Circuit Court of Jackson County, Missouri, which allowed him $7,500.00 fees, and on rehearing allowed him $11,500. From that judgment petitioner Louise McGrew Moffett appealed to the Missouri Supreme Court, where $1,300.00 was allowed. Fees for his services in the equity accounting partition suit in the District Court of Harper County, Kansas, No. 7374, were disallowed on the grounds that Mr. Howard represented Commerce Trust Company as executor of the John Moffett estate and also as administrator of the Moffett Brothers partnership estate in the Harper accounting. Petitioner's counsel, A. E. Watson, and her present counsel, M. J. O'Donnell, represented petitioner in said Harper County, Kansas, equity suit No. 7374, and also represented Grace Torrance Clark as administratrix of the Thomas S. Moffett estate, and also as administratrix of the Moffett Brothers partnership estate in Kansas. Said attorneys were paid $3,900.00 fees by Mrs. Clark out of the Moffett Brothers funds for so representing her, 81 F. (2d) l. c. 437 (C46). Also, see (W111, W112).

Although petitioner Louise McGrew Moffett in the Howard fee case collaterally attacked many final decrees in the Harper suit, none were minimized, modified or changed, and the Missouri Supreme Court in the Howard fee case passed upon only one point, to-wit: What, if any, additional Moffett Brothers fee should be paid to respondent B. C. Howard. The Missouri Supreme Court so stated twice in said Howard fee case (42, 43). Later, in petitioner's damage suit alleging conspiracy against the same parties as here (29), *the Missouri Supreme Court again stated that but one point was passed upon in said Howard fee case,* that is, what additional Moffett Brothers fees Mr. Howard was entitled to (*Moffett* v. *Commerce Trust Co., et al.,* 193 S. W. (2d) 588, l. c. 592, 354 Mo. 1098).

The Kansas Harper suit, referred to in the Howard fee case, was started by Mr. Watson for T. S. Moffett, husband of petitioner, in 1929. It was an equity accounting partition suit and not a suit at law as one individual against another.

The Harper suit was started by said attorney, A. E. Watson, August 15, 1929, for T. S. Moffett in the District Court of Harper County, Kansas, suit No. 7374, who obtained service upon all parties interested in the four Moffett estates included in the litigation, and asked for partition and that the interests of the parties be determined. John Moffett's death August 23, 1927, dissolved the Moffett Brothers and Oklahoma partnerships. He was survived by his widow, Helen Moffett, who is now respondent Helen Weede. *Everyone entered personal appearance.* Plaintiff T. S. Moffett through said attorney A. E. Watson attempted to partition the Moffett Brothers lands before there was an accounting, notwithstanding said prayer that the interest of the parties be determined, and opposed an accounting, and appealed to the

Kansas Supreme Court (131 K. 582, 292 P. 947). Respondent Commerce Trust Company intervened prior to this appeal in both of its capacities *at the same time* in the Harper equity accounting suit as administrator of the Moffett Brothers partnership estate and as executor of the estate of John Moffett, deceased, and also asked that there be an accounting before partition. Respondent B. C. Howard represented the Commerce Trust Company. After hearings, the trial court held that an accounting was proper and approved the interventions by respondent Commerce Trust Company. Plaintiff T. S. Moffett through his attorneys M. J. O'Donnell and A. E. Watson appealed to the Kansas Supreme Court and also included the question of said interventions. The Kansas Supreme Court held that an accounting was proper and approved the intervention of the Commerce Trust Company in its two capacities. (*Moffett* v. *Moffett*, 292 P. 947, 131 K. 582.) ALL THIS TOOK PLACE BEFORE THE TRIAL ON THE MERITS OF THE HARPER EQUITY ACCOUNTING SUIT. Plaintiff T. S. Moffett died December 22, 1930, and the Harper suit was duly revived in the name of the widow of T. S. Moffett, Louise McGrew Moffett (petitioner herein) and Grace Torrance Clark, administratrix of the estate of T. S. Moffett, deceased, in Kansas. Mrs. Clark was also administratrix in Kansas for the Moffett Brothers partnership estate, having given additional bond in said estate of T. S. Moffett. T. S. Moffett was the last surviving partner of Moffett Brothers in Kansas and therefore in Kansas the administration of that estate fell into the estate of T. S. Moffett (*Louise McGrew Moffett* (petitioner) v. *Robbins*, 14 F. Supp. 602). Mrs. Clark filed pleadings, briefs and petition for certiorari and otherwise represented Moffett Brothers in said Harper equity suit, *reviving said Harper suit in the Kansas Supreme Court following the death of Joseph W. Moffett*, and also was

a party to said suit in the capacity of administratrix of the T. S. Moffett estate in Kansas (*Moffett* v. *Robbins, supra*). Said attorneys M. J. O'Donnell and A. E. Watson at all times in said Harper equity accounting suit represented said Louise McGrew Moffett (petitioner) individually and said Grace Torrance Clark in her said dual representative capacities.

Stopped on a comma in quoting Kansas Supreme Court.

The Howard fee case (345 Mo. 741), in quoting the Kansas Supreme Court decision (18 P. (2d) 555, 136 K. 711) in the Harper suit stopped on a comma immediately after the words "Commerce Trust Company Exhibit No. 8." It is very important that the part of the Harper opinion left out be considered in connection with the first part quoted by the Howard fee case as it relates to the same subject, and shows that substantial evidence supported the accounting decree in favor of the John Moffett estate, to-wit:

> "These books were in court at the trial, and the entries in them, the testimony concerning some of those entries, and a summary of them prepared by accountants, known in this record as 'Commerce Trust Company Exhibit No. 8' (the following was omitted from the Howard Fee Case opinion) (*Comma*)," constituted the evidence on which this finding was based. This evidence shows this indebtedness exactly as found by the Court, hence there is no lack of evidence to sustain the finding.
>
> Appellants complain because the court received in evidence the summary of the books made by the accountants, 'Commerce Trust Company Exhibit No. 8,' and contend that it was incompetent and hearsay, and they contend that without it the evidence was insufficient. Naturally the original books were voluminous. They had been brought to the court in large

boxes and trunks. They had been in possession of the plaintiffs (petitioner Louise McGrew Moffett and Grace Torrance Clark), who had helped keep the books in recent years and were familiar with them. It was appropriate for a summary to be made by some one from them, collecting and properly setting down the entries or items bearing upon the controverted issues to be determined by the court. The trial court admitted this summary in evidence as informative only and not conclusive, and permitted the parties to refer to the original books as much as they desired and gave them ample time to do so. All other evidence relating to this indebtedness, the books and entries therein which either party offered, was received by the court."

In Howard fee case petitioner's counsel claimed they procured judgment against Oklahoma partnership in Harper suit, and asked fees therefor. Now petitioner and one of same counsel assert said judgment is "void."

Petitioner herein is asserting that the said decrees of the District Court of Harper County, Kansas, are "void," but when B. C. Howard was asking allowance of attorney fees from Moffett Brothers in said Howard fee case, attorney A. E. Watson (petitioner's attorney) testified in the Circuit Court of Jackson County, Missouri, at Kansas City in response to questions by Martin J. O'Donnell, petitioner's present counsel, as follows:

"Q. Mr. Watson, while you were down there in this Harper case you may state whether or not you and your humble servant and Mr. Wilcox didn't actively endeavor to establish the claimed indebtedness against Moffett Brothers Cattle, Land & Lumber Company. A. We did." (W396.)

• • • • • • •

"Q. Now, as a matter of fact, Mr. Watson, you may tell His Honor if you didn't by your efforts

assemble all those people in the Kansas suit in the District Court of Harper County. A. Yes, I instituted the suit and got service on all of them." (W396; W397.)

"Q. Now then, you may tell His Honor as a man who has been practicing law in Kansas since 1890, whether or not in your judgment you and Mr. Wilcox and perhaps myself should be paid by Moffett Brothers partnership estate for obtaining that judgment against the Oklahoma partnership.

* * * * * * *

A. I think we should be paid a reasonable sum for our services in that regard." (W397.)

On cross-examination Mr. Watson testified:

"The Court (interrupting): Answer the question if you prepared any account to that effect. A. We didn't prepare any account. But we had the books there that showed the account, and we introduced them in evidence." (W398.)

"Q. In the accounting the Harper suit; but you didn't present to the court any account and ask the court to allow it against the Moffett Brothers Cattle, Land & Lumber Company partnership estate in favor of Moffett Brothers? A. We certainly did. We produced the books of account.

Q. Did you prepare any account?

The Court: Pleading? * * * Setting up an indebtedness to that effect.

A. No." (W398; W399.)

In response to questions by Mr. O'Donnell, said Grace Torrance Clark (plaintiff in Harper suit and sister to petitioner Louise McGrew Moffett) testified in said fee case:

"Q. And when it became necessary to make proof with reference to the claim against the Oklahoma

partnership you may state whether or not you assisted Mrs. Moffett and myself and Mr. Wilcox and we did what we could towards establishing that claim against the Oklahoma partnership of Moffett Brothers. A. Yes.

Q. And what part, if any, did Mr. Howard take in presenting that claim down there so far as you saw? A. Chiefly only what he had had the accountants write in Commerce Trust Company's Exhibit 8.

Q. The original account books that were down there were brought by you or Mrs. Moffett? A. We took them.

Q. Did your counsel offer those in evidence? A. Yes.

Q. Or such parts as were necessary? A. They did.

Q. And you may state whether or not I wasn't also along trying to help prosecute that claim against the Oklahoma concern. A. Yes." (W399-400.)

On cross-examination Mrs. Clark testified:

"Q. Mrs. Clark, you referred to the judgment rendered in favor of Moffett Brothers against the Moffett Brothers Cattle, Land & Lumber Company partnership estate for over $100,000.00. Wasn't that judgment—And you say you helped to establish that judgment—You have just now so stated—Wasn't it rendered in the exact amount of the principal sum as set out in Exhibit 8 as submitted by the accountants Kopp & Copman? A. There was never any controversy over the amount of that claim that was due.

Q. But answer my question as to whether it was the same amount as reported to the court by the accountants Kopp & Copman. A. The same amount as in Commerce Trust Company's Exhibit 8.

Q. And the claim of Moffett Brothers partnership estate against the T. S. Moffett estate was also decreed and judgment rendered in the Harper suit No. 7374, in the identical amount as set out in Exhibit 8 as prepared by the accountants Kopp & Cop-

man and as reported to the court in suit 7374. Is that correct? A. The principal was the amount shown in the statement. The interest was what Mr. Howard requested the accountants to compute and put on there.

Q. Well, all right. Wasn't the judgment, though, in conformity with the report of the accountants Kopp & Copman? 'Yes' or 'No.' You know. A. No, I don't think it was, wholly. • • •

Q. Could you tell the court that you represented Moffett Brothers in any way to try to collect the judgment against the T. S. Moffett estate in case 7374 in the Harper County District Court? A. There was never any contest about the principal or the actual amout due." (W400-401.)

Notwithstanding the testimony just quoted, a few years after the Howard fee case, petitioner Louise McGrew Moffett with her same lawyers, Messrs. O'Donnell and Watson, filed the damage suit for $2,500,000.00 in the Missouri courts alleging that all Harper decrees were "void." This resulted in the decision against petitioner of the Missouri Supreme Court, 193 S. W. (2d) 588 (Mo. ....., 1946). The United States Supreme Court dismissed the appeal, 329 U. S. 669; rehearing denied, 329 U. S. 827.

Thereafter in the United States District Court petitioner Louise McGrew Moffett filed instant damage suit No. 4581 for $2,500,000.00, and again asserted that all the Harper decrees were "void."

XIV.

When a court of equity takes jurisdiction of a case it will do complete justice and settle all rights of the parties affected.

The Harper County, Kansas, suit No. 7374 was an equity accounting partition suit where all interested parties entered personal appearance and the court had jurisdiction of the subject matter. *Moffett* v. *Moffett,* 292 P. 947, 131 K. 582 (1930); *Clark, Louise McGrew Moffett* (petitioner) v. *Helen Moffett* (now respondent Helen Weede) *et al.,* 18 P. (2d) 555, 136 K. 711 (Jan., 1933). There was a complete equitable determination of the rights of all parties as heretofore pointed out. Likewise, the powers of an equity court in the State of Missouri permit a complete adjudication. *Detienne* v. *Peters et al.,* 188 S. W. (2d) 954, l. c. 956.

XV.

Final judgment in state court imports verity and it will not be presumed that the judgment was unsupported by evidence.

Owens v. *Battenfield,* 8 Cir., 33 Fed. (2d) 753.
Parker Bros. v. *Fagan,* 68 Fed. (2d) 616 (W756).
Harrington v. *Denny, et al.,* 3 Fed. Supp. 584.
Dionne v. *Hudspeth,* 199 Pac. (2d) 176, 166 K. 72.

XVI.

United States District Court has no appellate power over decisions of state courts. Also, has no jurisdiction to set aside final state decisions.

Louise McGrew Moffett (petitioner), *etc.,* v. *Robbins, etc.,* 10 Cir., 81 Fed. (2d) 431 (W749).
Louise McGrew Moffett (petitioner), *etc.,* v. *Robbins, etc.,* 14 Fed. Supp. 602.
Smith v. *Apple,* 8 Cir., 6 Fed. (2d) 559 (W749).
Coleman v. *Apple,* 8 Cir., 298 Fed. 718, 720, 721.
Riley v. *New York Trust Co.,* 315 U. S. 343, 62 S. Ct. 608, 86 L. Ed. 885.

XVII.

Whenever a decision of a state court becomes relevant in any aspect of a suit in a United States court, the latter must take judicial notice of the state decisions, just as if they were fully pleaded in the record.

Sewall v. *Mutual Drug Co.*, 7 F. R. D. 154, 155.
State of Ohio ex rel. Seney v. *Swift & Co.*, 6 Cir., 270 Fed. 141, 142; Cer. den., 257 U. S. 633, 42 S. Ct. 47, 66 L. Ed. 407, appeal dismissed, 260 U. S. 146, 43 S. Ct. 22, 67 L. Ed. 176.

Respondents Helen Weede and Orlin A. Weede hereby refer to the list of final judgments, decrees and orders in states of Missouri, Kansas and Oklahoma since the death of John Moffett, August 23, 1927, listed and cited in the Statement herein in litigation to which petitioner was a party and of which she complains herein, as fully as if set out in this argument, as well as those set out in the motions to dismiss as filed herein by respondents Helen Weede and Orlin A. Weede (94-99; 83-94), as all of said adjudications are now *res judicata* and cannot be collaterally attacked herein. Respondent Helen Weede's Exhibits Nos. 1 to 50, inclusive (W490-999), and respondent Orlin A. Weede's Exhibits 1 to 40 (W36-490) filed herein are hereby referred to as fully as if set out in this argument, and the Court's attention is especially invited to the INDEX to the Supplemental Record of respondents Helen Weede and Orlin A. Weede making direct references to said Exhibits. Said STATEMENT is also made a part of this argument for all purposes. Limited space makes this necessary. The District Court did not exclude the material filed herein by the parties (W1016). No equitable relief is sought herein (W1016). It is a damage suit (W1013).

PETITIONER DESIGNATED ENTIRE RECORD (W1; W1012), and RESPONDENTS FILED SUPPLEMENTAL RECORDS TO SHOW COURT RECORDS. THE COURTS BELOW HELD THAT ON THE FACE OF PETITIONER'S SECOND AMENDED COMPLAINT NO CAUSE OF ACTION IS STATED, that is, NO CLAIM IS STATED UPON WHICH RELIEF CAN BE GRANTED. MOTIONS TO DISMISS WERE SUSTAINED (82, 83). RESPONDENTS HELEN WEEDE AND ORLIN A. WEEDE MOTIONS APPEAR: (83-94; 94-99) (W6, W7).

A motion to dismiss for "failure to state a claim upon which relief can be granted" is the modern equivalent of a demurrer. *United Transport Serv.* v. *National Mediation Bd.*, 179 F. 2d 446, 452.

Public policy dictates that there be an end to litigation. *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525, 51 S. Ct. 517, 75 L. Ed. 1244. To same effect: *Box* v. *Rundell*, 179 F. 2d 626, 628, citing above Baldwin case.

Conclusion.

Respondents Helen Weede and Orlin A. Weede submit that the many final decisions, judgments, decrees, adjudications and orders which appellant is attempting to collaterally attack herein and again relitigate herein, are all *res judicata* as to all matters adjudicated and which could have been adjudicated. That petitioner may not split litigation and litigate piecemeal. That the attacks upon pending state cases and against the state statutes herein present no federal question. That petitioner cannot in *a damage suit at law* make such collateral attacks. It is submitted that this prolonged litigation should come to an end. John Moffett died August 23, 1927. Thomas S. Moffett died

December 22, 1930. Petitioner has relitigated through the years, and would seem reasonable that such matters be concluded, and that the said petition for writ of certiorari should be denied.

Respectfully submitted,

ORLIN A. WEEDE,
WALTER A. RAYMOND,
R. CARTER TUCKER,
Counsel for Respondent Helen Weede.
ORLIN A. WEEDE, *Pro Se.*
1200 Dierks Building,
Kansas City 6, Missouri.

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In the

Supreme Court of the United States

October Term, 1951.

No. 75.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of October 8, 1951, denying the petition for certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case, as prayed for in the petition filed May 26, 1951.

Reasons for Granting a Rehearing and Issuing the Writ.

1. The denial of the petition for certiorari on October 8, 1951, was an intervening circumstance of substantial and controlling effect which, in itself, created petitioner's constitutional right to question the validity of Section

1254 (1), Title 28, U. S. C., which did not accrue until this Court denied appellate review of this case by said order, whereupon said constitutional right accrued under the law declared by the Court in the decisions cited in Chapter 38, Robertson & Kirkham's Jurisdiction of the Supreme Court of the United States, 2d Ed., and indicated in the basic rule with which said chapter begins. Thus:

> "Basic Rule—Necessity of Existing or certainly impending injury to those personal or property rights of the complaining party which are entitled to and susceptible of protection by judicial action."

It is stated in the text at page 543:

> "It results that in every case coming to the Supreme Court, whether invoking the exercise of its original jurisdiction or seeking review of the decision of state or lower federal court, it is a jurisdictional prerequisite that the Supreme Court be satisfied that the suit involves the vindication of rights personal to the parties thereto, which are entitled to and susceptible of protection by judicial action in that proceeding, and which are being invaded, or the invasion of which is certain and impending.'"[4]

Another intervening circumstance, of like substantial and controlling effect, was the decision of this Court in *Collins* v. *Hardyman*, 341 U. S. 651-664, on June 4, 1951—after the filing of the petition for certiorari. The opinion in said case discloses that petitioner's complaint states a cause of action under the provisions of Sections 41, 42, 43, 47, 48 and 49a, Title 8, U. S. C. Said decision in *Collins* v. *Hardyman* by this Court is in direct conflict with the opinion and decision of the Court of Appeals and the Federal district court.

[4]See all cases cited in this chapter.

Which intervening circumstances in connection with the record in this case showing that the illustrious but aged and ailing District Judge—though he found facts in his opinion showing the complaint stated a cause of action—(see R. 783) yet he based his decision not on the allegations of the complaint but on suspicion of the truth of the allegations—(see R. 783) which truth was established by the admissions of respondents by their motions to dismiss, and by the certified copies of the records showing the collusive judgments and proceedings by virute of which petitioner was deprived of her property and her rights under the United States Constitution and law alleged—conclusively establish the truth of said allegations. The affirmance by the Court of Appeals amounted to a most gross miscarriage of justice. Therefore, the order denying certiorari has had an effect amounting to a miscarriage of justice—which can only be corrected by setting said order aside and granting certiorari, and reviewing and reversing the erroneous judgments of the lower federal courts.

The substantial ground that the judgment of the District Court was based upon suspicion, and not upon the allegations of the record, nor on the proof conclusively establishing the truth of said allegations, is a substantial ground for rehearing available to this petitioner, though not previously presented.

The rule often stated by this Court, well reproduced in *Muskrat* v. *United States,* 219 U. S. 346, at l. c. 359, questioning the validity of Section 1254 (1), Title 28, U. S. C., necessitates the decision of the validity of said statute, the grant of a rehearing, the issuance of the writ, and reversal.

> "Whenever in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature,

> state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not."
>
> (*Muskrat* v. *United States,* 219 U. S. 346, l. c. 359.)

The foregoing operates to make this case a case of great public importance.

2. Section 1254 (1), Title 28, U. S. C., as construed and applied herein in denying the petition for certiorari, conflicts with Section 2 of Article III of the Constitution, and is therefore void.

3. Said statute, by attempting to delegate the power, if any, vested in Congress by Section 2 of Article III of the Constitution to except this case from the appellate jurisdiction of this Court, is void because Congress could not delegate said legislative power vested in it by the Constitution to this Court.

4. Section 2 of Article III of the Constitution, providing:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the *Congress* shall make"

was changed by Section 1254 (1), Title 28, U. S. C., as construed by the order denying certiorari, to read:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the *Supreme Court in its discretion* shall make",

which change rendered said statute, and the order herein denying certiorari based on it, void. Chief Justice Coke prayed

> "God send me never to live under the law of convenience or *discretion.*" (2 Rushworth's Collections 4).

In *Cary* v. *Curtis,* 3 Howard 236, l. c. 245, this Court ruled:

> "* the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, * * To deny this position would be to elevate the *judicial* over the legislative branch of the government, *and to give the former powers limited by its own discretion merely.*" (Italics ours.)

5. The order herein denying certiorari, and said Section 1254 (1), Title 28, U. S. C., constituted the mechanism used by this Court to keep this case out of this Court (*Darr* v. *Burford,* 339 U. S. 200, l. c. 227). Whereas, the mechanism provided by the Constitution is (Art. III, Section 2)

> "* the supreme Court shall have appellate Jurisdiction * * * with such Exceptions. * * * as the Congress shall make."

Said order and statute, because of conflict with said provisions of the Constitution, are void.

6. If Congress were given the power by the words in said sections of the Constitution

> "* with such Exceptions, * * as the Congress shall make"

to except this case from the appellate jurisdiction of this Court, then the power of Congress was exclusive and could not be delegated to this Court under the rule stated in *Williams* v. *United States,* 289 U. S. 553-581, l. c. 580:

> "* it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands,* 277 U. S. 189, 201, 202, 72 L. ed. 845, 48 S. Ct. 480." (Italics the Court's.)

And so Section 1254 (1), Title 28, U. S. C., pursuant to which by its order denying certiorari this Court excepted this case from the appellate jurisdiction of this Court, is void.

7. The provision extending the judicial power to "all" cases in the first class in Section 2 of Article III, and omitting the word "all" as to the second class, was presented for consideration to the Convention by the proposition submitted by Mr. Pinkney (Formation of the United States, p. 572) that:

> "The Jurisdiction of the supreme Court shall be extended to *all* controversies between the U. S. and an individual State, or the U. S. and the Citizens of an individual State,"

which proposition was rejected by the Convention and the word "all" intentionally omitted from the second class, and placed in the first class. The words

> "* with such Exceptions, * * as the Congress shall make"

could not be held to authorize Congress to except any of the cases of the first class, specified in Section 2 of Art. III of the Constitution, for such holding would create the want of grammatical sequence or coherence in three phrases of said section, or result in the use of an anacolution in three constitutional phrases. This consideration occasioned the construction in *Martin* v. *Hunter,* 1 Wheat. 304, as to the word "all", l. c. 333, 334, 335, 336, having been dropped from the second class "seemingly *ex industria*"; that in *Cohens* v. *Virginia,* 6 Wheat. 265, l. c. 378-379, pointing out that the

> "* clause extends the jurisdiction of the court to all the cases described, without making in its terms any exceptions whatever, *

and that

> "If there be any exception, it is to be implied against the express words of the article,"

and l. c. 423:

> "* the subject was fully discussed and exhausted in the case of *Martin* v. *Hunter*"

in which it was held, l. c. 336:

> "* as to the other cases of the second class, they might be left to be exercised under the *exceptions* and regulations which Congress might in their wisdom choose to apply,"

and which case was discussed and followed in *The Moses Taylor* v. *Hammons,* 4 Wall. 411-431, and *Williams* v. *United States,* 289 U. S. 553-581, l. c. 572. Petitioner's reply brief, pages 109 to 122, fully discusses said opinions, to which attention is now called.

8. The rejection by the Convention of a motion, proposition or resolution seeking to give power to Congress

to enact Section 1254 (1), Title 28, U. S. C., as construed by this Court in its order denying petition for certiorari, establishes the truth that the Convention never intended that Congress should have such power. It has ever been the rule that rejection by the Convention of any motion, proposition or resolution made by a member thereof has always nullified every contention to the effect that the rejected proposition could be held to be part of the Constitution. Witness Daniel Webster in his reply to Calhoun as to the Constitution being a compact at page 447 of Porter & Coates Speeches of Daniel Webster:

> "If, sir, any historical fact in the world be plain and undeniable, it is that the convention deliberated on the expediency of continuing the confederation, with some amendments, and rejected that scheme, and adopted the plan of a national government, with a legislature, an executive, and a judiciary of its own. They were asked to preserve the league; they rejected the proposition. They were asked to continue the existing compact between states; they rejected it. They rejected compact, league, and confederation, and set themselves about framing the constitution of a national government; and they accomplished what they undertook."

The following appears from the record of the Convention on August 27, 1787:

> "The following motion was disagreed to, to-wit to insert 'In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct'."
>
> (United States, Formation of the Union, page 625.)

The rejection of said motion, by the Convention, to substitute the words

> "* the Judicial power shall be exercised in such manner as the Legislature shall direct"

for the words

> "* the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make"

has made definite and certain the meaning of the constitutional language and the insufficiency of said Section 1254 (1), Title 28, U. S. C., to authorize this Court to except this case from the appellate jurisdiction thus constitutionally vested in this Court.

That the Convention was engaged in making the Constitution certain by striking and inserting words in the proposed draft of the Constitution between August 6, 1787, and September 17, 1787, when it was completed, is further shown by the record of its proceedings on Tuesday, August 28, 1787, as to which the record recites:

> "It was moved to strike out the words 'it shall be appellate' & to insert the words 'the supreme Court shall have appellate jurisdiction,'—in order to prevent *uncertainty* whether 'it' referred to the *supreme Court,* or to the *Judicial power.'*

Of the 10 States represented, 9 voted "Ay" and 1 "no."

9. The importance of this case compels petitioner to call the Court's attention to Clause 3 of Article VI of the Constitution providing that

> "* all * * judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; *"

(See United States, Formation of the Union, Documents illustrative of the Formation of the Union of the American States, Published 1927 by the Government Printing Office, under the Supervision of the Director of the Library of Congress, pages 625 and 626.)

Said clause imposes the duty on each and all of the Justices of this Court, both individually and collectively, and as a Court, to now take jurisdiction of the question raised by this petitioner for a rehearing as to the validity of said Section 1254 (1), Title 28, U. S. C., as construed and applied by this Court in its order denying the writ prayed, and to decide whether or not said statute was enacted "pursuant to the Constitution," or in violation thereof. The order denying certiorari involved the construction of said statute to the effect that it conferred power on this Court to except this case from the appellate jurisdiction of this Court. Since said statute, as thus construed, attempts to invest this Court with power to make exceptions to the appellate jurisdiction vested in this Court by the Constitution—which power to make exceptions to said appellate jurisdiction, if any, is vested only in the Congress a constitutional question of the gravest importance is presented.

In Zane's The Story of Law, pages 197-198, it is said:

> "It has been stated before that the failure of Greek law was in its inability to discover a tribunal competent to expand, administer, and apply the private law among even its own citizens. This failure arose both from the popular nature of the tribunals and from the want of a legal professional class. It remained in the evolution of law for the Roman to develop this competent tribunal and a powerful profession. The result was that among the Romans there was a rule of law. Among them it was not possible to have a condition where the tribunal openly avowed that it would apply to a controversy the unquestioned law applicable, *only when it seemed proper to apply it.*" (Italics ours.)

The authority above quoted, John M. Zane, is a legal historian and author whose standing has been recognized

by approved legal scholars, amongst whom is the illustrious Charles Warren, whose research enabled this Court to correct the almost century old rule in *Swift* v. *Tyson*. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, l. c. 72-73—and who, at pages 20 and 30 of his History of the American Bar, cites "The Five Ages of the Bench and Bar of England" by John M. Zane.

Conclusion.

For the reasons set forth above, and in the petition for certiorari, it is respectfully urged that a rehearing be granted, and, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Kansas City, Missouri, October 17, 1951.

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In the Supreme Court of the United States

October Term, 1951.

No. 75.

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of THOMAS S. MOFFETT, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP and R. E. COPMAN, *Respondents.*

PETITION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING.

Petitioner prays leave to file a second petition for a rehearing herein for the reasons stated in the copy thereof attached hereto and made a part hereof.

MARTIN J. O'DONNELL,

Attorney for Petitioner.

PETITION FOR REHEARING.

I.

This petition is presented in accordance with the practice followed in *Stone* v. *White,* where certiorari was denied at the 1935 Term, 296 U. S. 596, 56 S. Ct. 112, 80 L. Ed. 422, but the time to file a petition for rehearing was extended until November 2, 1936, 298 U. S. 646, 56 S. Ct. 950, 80 L. Ed. 1377. Although the petition for rehearing was then denied, 299 U. S. 622, 57 S. Ct. 228, 81 L. Ed. 458, later in the 1936 term the petitioner moved for leave to file another petition for rehearing on the ground that a conflict of circuits had arisen. The Court granted the motion and granted certiorari. 300 U. S. 643, 57 S. Ct. 610, 81 L. Ed. 858.

The opinion in said case (301 U. S. 532) after argument states, l. c. 533:

> "We granted certiorari, 300 U. S. 643, *ante,* 858, 57 S. Ct. 610, because of the conflict of the decision below with that of the Court of Appeals for the Third Circuit, *United States* v. *Arnold,* 89 F. (2d) 246."

In *Stefanelli* v. *Minard,* No. 2 October Term 1951, 20 Law Week 4035—decided after the petitions for certiorari and rehearing herein—were denied, this Court construes the criminal and civil variety of the Civil Rights Acts with the same measuring rod, and in Note 12 refers to a case in the Sixth Circuit, and another in the Third Circuit, as authorizing damages under said Civil Rights Acts:

> "• • • where the fairness of state court proceedings has been attacked in the lower federal courts under R. S. sec. 1979 and related sections."

Then, using the words "But see," said Note 12 calls attention to cases from the Fifth, Seventh, Ninth and Tenth Circuits directly in conflict with the said decisions of said Sixth and Third Circuits.

Since the fairness in this case of state court proceedings was attacked in the District Court for the Western District of Missouri, and in the U. S. Court of Appeals for the Eighth Circuit—the truth of which charges were conclusively admitted by the motions to dismiss, which were sustained and judgment entered, then the decision of the Eighth Circuit as reflected in its opinion, showing that the fairness of the state court proceedings was attacked in that court and the lower court under Section R. S. 1979, and related sections is in direct conflict with said decisions of said Sixth and Third Circuits, and necessitates the issuance of the writ herein under the time-honored rules of this Court never better stated than in *Forsyth* v. *Hammond,* 166 U. S. 504, l. c. 512, when, in construing the certiorari statute, this Court said:

> "Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision."

And in *Magnum Import Co.* v. *De Spoturno Coty,* 262 U. S. 159, l. c. 163, Chief Justice Taft for the Court said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And so, under the statute under which this Court is now proceeding, this case is an ideal case for the utilization of the Court's discretion to settle the conflict, which said Note 12 embodied as a part of the opinion of this Court has found to exist, wherein the circuits which conflict includes that shown by the opinions in said Sixth and Third Circuit cases and the opinion in this case to-wit: *Moffett* v. *Commerce Trust Co.,* 187 Fed. 2d 242.

II.

Another reason for granting leave to file this petition for rehearing, and granting same, is the intervening circumstance of substantial and controlling effect that this Court on June 2, 1952, in its decision in the Steel Cases, Nos. 744 and 745, October Term 1951, has destroyed the doctrine of State Necessity reflected in the Stefanelli opinion, if it applied the law in that case to remedy the injustice done to petitioners whose basic rights were invaded, such application

> "* * * would invite a flanking movement against the system of state courts by resort to the federal forum, with review if need be to this Court to determine the issue. * * * the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the States and the federal government in law enforcement.' *Screws* v. *United States,* 325 U. S. 91, 108. Only last term we reiterated our conviction that the Civil Rights Act 'was not to be used to centralize power so as to upset the federal system.' *Collins* v. *Hardyman,* 341 U. S. 651, 658."

For the Constitution did not authorize this Court, on the ground of state necessity, as there expressed, to nullify the Civil Rights Acts, either in a civil or criminal

case, or by excepting this case from its appellate jurisdiction, under the age-old rule binding all courts, well stated in *Rex* v. *Wilkes,* 20 Howell's State Trials 1112, as follows:

> "The Constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences how formidable soever they might be; if rebellion was the certain consequence, we are bound to say *Fiat justitia ruat coelum.*"

Which said principle was made applicable to the inhabitants of Missouri in *State* v. *Fry,* 4 Mo. 1. c. 193, where its Chief Justice answered a contention that state necessity should control rather than the law, saying:

> "One answer to this argument should be, the courts are bound to do their duty under the law and the constitution and should say as Lord Mansfield said in the case of the *King* v. *Wilkes* '*Fiat justitia ruat coelum.*' "

Said decision in the Steel Case has conclusively and permanently established, for all time, that the Constitution binds the President, the Congress and the Supreme Court. Consequently, the matter stated in the petition for rehearing, now made part hereof (but overruled on November 13, 1951) when supported by the doctrines stated in the opinion in the Steel Case, necessitates a holding that the Congress only can make exceptions to the appellate jurisdiction vested in this Court by Section 2 of Article III of the Constitution, and that this Court is itself powerless to exercise its discretion to except this, or any other, case from its appellate jurisdiction.

Since the Congress alone was given the power by the words in Section 2 of Article III of the Constitution

> "• • • with such exceptions and under such regulations as the Congress shall make"

to except this case from the appellate jurisdiction of this Court, then the power of Congress was exclusive and could not be delegated to this Court under the law stated in *Williams* v. *United States*, 289 U. S. 533-581, l. c. 580:

> "• • • it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands*, 277 U. S. 189, 201, 202, 72 L. Ed. 845, 48 S. Ct. 480." (Italics the Court's.)

Said Stefanelli decision conclusively established that the two first cases cited in its Note 12 of the opinion are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Moffett* v. *Commerce Trust Co.*, 187 F. 2d 242, Rule 38, paragraph 5 (b), providing:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter;"

is controlling herein and compels the grant of the writ.

The decision in the Steel Cases on June 2 contradicts the idea expressed in the Stefanelli case, that state necessity justifies a denial of the protection and benefit of a United States statute, and has given effect to the United States Constitution and laws and to the fundamental principle stated in *Ex parte Milligan*, 4 Wall. 2, l. c. 121, when it pointed out that state necessity does not authorize

this, or any other federal court, to deny effect to that leading and fundamental principle by declaring:

> "• • • the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."

In the Steel cases, this Court points out that prior erroneous decisions of this Court did not warrant the decision sought by the Government in that case, declaring:

> "But even if this be true Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any department or officer thereof.'
>
> "The founders of this nation entrusted the law-making power to the Congress alone in both good and bad times."

The principle applied in ascertaining the limitations of the President's Constitutional powers in the opinion, to-wit:

> "• • • he shall take care that the laws be faithfully executed"

and that by reason thereof:

> "• • • in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law maker."

is of controlling force herein, for measured by the same yardstick, the following sentence in Section 2 of Article III of the Constitution:

> "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both

> as to law and fact, with such exceptions and under such regulations as the Congress shall make."

expressly excludes the idea that this Court is to be a law maker as to its own appellate jurisdiction.

Since the Constitution contemplated that only the Congress could except any case reaching this Court from its appellate jurisdiction, then the Congress could not vest this Court with power to be a law maker and vest in its discretion to make the exceptions which the Constitution fastened upon Congress alone.

For the reasons set forth above, and in the petition for certiorari, it is respectfully urged that a rehearing be granted, and, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

MARTIN J. O'DONNELL,
Counsel for Petitioner.

Kansas City, Missouri, June 5, 1952.

End